

Article

Reconstructing the Privileges or Immunities Clause

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I also want to acknowledge the work of two scholars whose contributions on this subject are especially important. The interpretation of the Privileges or Immunities Clause that I present here was recovered for our century by David Currie, who believes as I do that the clause mandates intra-state equality with respect to the rights of state citizenship. DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 342-51* (1985). In addition, I was greatly assisted in understanding these issues by William Nelson's book. WILLIAM NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

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Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.<sup>1</sup>

On June 8, 1866, as the Senate prepared to take its final vote on the proposed Fourteenth Amendment to the Constitution, Senator Reverdy Johnson of Maryland moved to delete the first part of the second sentence, the Privileges or Immunities Clause. He made the motion "simply because [he did] not understand what would be the effect of that."<sup>2</sup> The motion was rejected without a recorded vote, and the Amendment passed with the clause intact.<sup>3</sup>

As usual, however, Reverdy Johnson had a point.<sup>4</sup> The clause mystifies us no less than it did him.<sup>5</sup> Judging by the Supreme Court's case law, one would think that Johnson's motion had passed. No important line of decision rests on the clause; every student of constitutional law quickly learns that it was virtually read out of the document by the *Slaughter-House Cases*.<sup>6</sup> The disappearance of the Privileges or Immunities Clause, of course, has not kept Section 1 of the Fourteenth Amendment from becoming the principal font of constitutional law through the Due Process and Equal Protection Clauses. But this result seems upside down to those students of the Fourteenth Amendment who believe that the Privileges or Immunities Clause was thought by its framers to be one of the central elements of Section 1.<sup>7</sup> It is almost as strange as if the Supreme Court had developed its ramified system of federal jurisdiction doctrine solely in cases under the Multistate Land Grants Clause.<sup>8</sup>

This Article is one more attempt to end this embarrassment. My main thesis rests on a distinction, central during Reconstruction and still familiar today, between substantive and equality-based constitutional limitations. A *substantive* protection either prescribes or forbids a certain content of state law. An *equality-based* protection, by contrast, says nothing about the substance of the state's

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1. U.S. CONST. amend. XIV, § 1.

2. CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866).

3. *Id.*

4. Johnson was Attorney General of the United States from 1849-1850 and was twice elected Senator from Maryland, first as a Whig and then as a Democrat. From the 1820's until his death in 1876, he was a leading practitioner before the Supreme Court. See 92 U.S. v-xvi (1876) (tributes of Supreme Court Bar upon Johnson's death).

5. The standard view regarding the effect intended by the drafters of the Privileges or Immunities Clause seems to be that it "has been a mystery since its adoption." ROBERT H. BORK, *THE TEMPTING OF AMERICA* 166 (1989).

6. 83 U.S. (16 Wall.) 36 (1873).

7. See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 152, 163 (1970) (Harlan, J., concurring in part and dissenting in part); JOHN H. ELY, *DEMOCRACY AND DISTRUST* 22 (1980).

8. See U.S. CONST. art. III, § 2 (judicial power of the United States shall extend to controversies "between Citizens of the same State claiming Lands under Grants of different States").

law; it instead requires that the law, whatever it is, be the same for all citizens. I argue that the Privileges or Immunities Clause is, with respect to everyday rights of state law, the latter kind of protection. The main point of the clause is to require that every state give the same privileges and immunities of state citizenship—the same positive law rights of property, contract, and so forth—to all of its citizens.

This equality-based reading becomes the natural one once we understand that in 1866, when people discussed abridgments of the privileges or immunities of citizens, they mainly were talking about laws that deprived certain classes of citizens of the civil rights accorded to everyone else. Such abridgments were called Black Codes. The Codes, which the ex-Confederate states enacted in 1865 and 1866 before the onset of Radical Reconstruction, restricted freed slaves' rights to make and enforce private contracts, to own and convey real and personal property, to hold certain jobs, to seek relief in court, and to participate in common life as ordinary citizens. Some included vagrancy laws that effected a virtual return to slavery for those unfortunate enough to be caught up in them.<sup>9</sup>

This equality-based reading provides a solution to the larger riddle of the Fourteenth Amendment, namely discovering how the text of Section 1 accomplishes its primary purpose. That purpose was to mandate certain rules of racial equality, especially those contained in Section 1 of the Civil Rights Act of 1866. The Act guaranteed that black and white citizens would be equal with respect to a list of vitally important rights.

My argument begins by demonstrating that such a riddle exists. With the problem identified, the discussion turns to a brief history of the Amendment's drafting. The principal lesson to be drawn is the centrality of the Civil Rights Act. With that history in mind, I take up the concept of equality as it was understood during Reconstruction, suggesting that the Republicans phrased their opposition to race discrimination in terms of the more general principle that all citizens were entitled to the same basic rights of citizenship.

In the terminology of Reconstruction and the Fourteenth Amendment, a law abridged a state law right when it took that right away from only one group of persons. Black Codes served as the quintessential example of an abridgment of state law rights. A law changing the content of a right equally for everyone was not an abridgment. The privileges or immunities of citizens of the United States include the very rights deriving from state law that were restricted by Black Codes.<sup>10</sup> Thus, an amendment that forbade the states from abridging

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9. The enactment and content of the Black Codes are described in 6 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88, at 110-17 (1971). See also S. EXEC. DOC. NO. 6, 39th Cong., 2d Sess. (1867) (collecting Black Codes); EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 29-44 (Washington, D.C., Philp & Solomons, 1871) (summarizing Black Codes). I discuss a number of examples in more detail below.

10. This is true despite *Slaughter-House's* assertions to the contrary. See *infra* notes 108-16 and accompanying text.

privileges or immunities would ban caste legislation with respect to citizens' rights and place the principle of the Civil Rights Act in the Constitution.

The natural objection is that I have misplaced the Fourteenth Amendment's requirement of equality. Orthodox teachings maintain that the Equal Protection Clause constitutionalizes the Civil Rights Act of 1866. This orthodoxy, however, is belied by the way in which the concept of the "protection of the laws" was used in 1866.<sup>11</sup> I argue that the framers of the Fourteenth Amendment more likely understood the "protection of the laws" to be a narrower body of rights than either "the privileges and immunities of citizens" or those given attention by the Civil Rights Act. Thus, the Equal Protection Clause is not best understood as accomplishing the principal purpose of Section 1 of the Fourteenth Amendment.

After presenting this interpretation of the two clauses, I consider the real meaning of the Privileges or Immunities Clause in more detail and discuss its application to various Fourteenth Amendment questions. I do not suggest that there are easy answers to the questions thus formulated, but they have the virtue of being the Constitution's questions rather than our own.

## I. THE RIDDLE OF THE TEXT

### A. *Posing The Riddle*

This Article suggests an unorthodox reading of the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>12</sup> That reading is part of an attempt to do something surprisingly difficult: to explain how the language of the Amendment can have the meaning that it is supposed to have. Virtually everyone agrees that Section 1 of the Fourteenth Amendment was intended at least to empower Congress to pass the Civil Rights Act of 1866.<sup>13</sup> Most students of history would go a bit further and say that the Amendment actually writes the

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11. See *infra* notes 199-225 and accompanying text.

12. The Constitution contains both the Privileges *and* Immunities Clause of Article IV and the Privileges *or* Immunities Clause of the Fourteenth Amendment. In order to reduce confusion, I usually will refer to the Article IV provision as the Comity Clause, although I will call it the Privileges and Immunities Clause in contexts that raise the question whether the clause is about interstate comity only.

13. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27. As Nelson explains, "section one was added to the amendment at least in part to remove doubts about the constitutionality of the 1866 act." NELSON, *supra* note †, at 104. Those Republicans who thought that the Act was constitutional without the amendment have relied mainly on Congress' power to eliminate badges of slavery under the 13th Amendment. This was the theory espoused by the Act's author, Senator Lyman Trumbull of Illinois. See *infra* notes 54-55 and accompanying text.

substance of the 1866 Act into the Constitution.<sup>14</sup> Any theory of the Fourteenth Amendment must therefore explain how it validates the Civil Rights Act.

### 1. *The Inadequacy of the Equal Protection Clause*

The answer is not immediately obvious. The Civil Rights Act first makes certain people citizens of the United States. It then in effect forbids the states from discriminating among citizens on the basis of race, color, or previous condition of servitude with respect to a number of matters. If we turn to the Amendment, things get off to a good start. It too begins by defining American citizenship so that native-born former slaves will be citizens. The analysis breaks down, however, when we try to match the Act with the second sentence of Section 1.

The orthodox derivation of the Act from the words of the Amendment holds that the Equal Protection Clause does the job. The clause does have the word "equal" in it, but its suitability for this task ends there. First, unlike both the Civil Rights Act and the Privileges or Immunities Clause, the Equal Protection Clause extends to all persons, not simply citizens. This difference, which is striking to begin with, becomes more suspicious when we realize that nineteenth-century American law frequently distinguished between the rights of citizens and the rights of noncitizens, principally aliens.<sup>15</sup>

Second, the Equal Protection Clause's function as the basis of the Act rests on a piece of textual sleight of hand familiar from *Yick Wo v. Hopkins*,<sup>16</sup> which asserts that "the equal protection of the laws" means "the protection of equal laws."<sup>17</sup> If that seems obvious to us, it is because custom has run a groove in our minds. By shifting the focus from "protection" to "laws," the *Yick Wo* maneuver draws our attention away from the embarrassing fact that the subject of the Equal Protection Clause is protection. That word suggests either the administration of the laws or, if it is about their content, laws that protect as opposed to laws that do other things. In order for the clause to be a requirement of equality in everything the states do, the word "protection" must simply drop out, so that the text would read "equal laws" rather than "the equal protection of the laws."

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14. Section 1 of the Act first stated that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, were citizens of the United States. It then provided that in every State and Territory all citizens, without regard to race, color, or previous condition of servitude, should have the same rights as white citizens

to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property . . . and shall be subject to like punishment, pains, and penalties, and to none other.

Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

15. See, e.g., *infra* notes 229-46 and accompanying text.

16. 118 U.S. 356 (1886).

17. *Id.* at 369.

## 2. *The Mystery of the Privileges or Immunities Clause*

If the Equal Protection Clause is ill adapted to the function it has long been called on to perform, we must look to the Privileges or Immunities Clause, which seems promising at first. Like the Act, and unlike the Equal Protection Clause, it deals with the rights of citizens. Better yet, it refers to the “privileges or immunities of citizens,” which in the 1860’s often meant the very private law rights of contract and so forth that the Act dealt with. But although the Act and the clause appear to deal with the same subject matter of citizens’ rights, they seem to provide different kinds of protection. Recall the distinction noted earlier between equality-based and substantive provisions. The Act is an antidiscrimination requirement that says nothing about the content of state laws. Thus, it is an equality-based provision. The clause, by contrast, reads like the First Amendment, which forbids Congress from abridging the freedom of speech. The content of the freedom of speech is given by the Constitution, not by Congress. If the Privileges or Immunities Clause is like the First Amendment in this regard, it is not an antidiscrimination provision but a substantive protection for the privileges and immunities of citizens of the United States, whatever those rights may be.

If that is what the clause means, our search for the ground of the Act is in serious trouble. As a substantive provision, the Privileges or Immunities Clause could mean one of two things. First, the privileges and immunities it protects might be rights that are not identical to the specific rights contained in the positive law of the states. In that case, the clause requires that the law of every state be such as not to invade the related protected right. For example, it could require that the Maryland law of contract respect some minimum right to enter into agreements. This limitation would not, however, dictate all of Maryland’s contract law; the parol evidence rule could take any number of forms.

If the Privileges or Immunities Clause gives this kind of substantive protection, then it does not constitutionalize or authorize the Civil Rights Act. Consider a federal constitutional provision stating that everyone shall have a substantive right to own property. This gives everyone the same minimum rights. But it is not equivalent to saying that everyone shall have the *same* right to own property. As long as there is any form of property ownership that is outside the minimum—say, the right to own in tenancy by the entirety—the states will remain free to create that form or not, and to permit only certain

persons to enjoy it.<sup>18</sup> Absolute protection for the minimum has no effect on, and therefore does not mandate equality with respect to, anything outside of the minimum.

The second possibility, if the clause is substantive, is that the privileges and immunities of citizens are not minimum rights, but a complete specification of the law in certain areas. This reading would constitutionalize the Civil Rights Act in a sense, because the law it created would be the same for all races. Such a reading, however, would achieve this constitutionalization by dictating most of state law. There is but one Fourteenth Amendment, which applies to all the states and cannot be changed without amending the Constitution. As a result, it would be impossible for the states or Congress to change, say, the rule against perpetuities; moreover, questions would inevitably arise concerning exactly what form of that rule—among the various forms in use among the states—had been constitutionalized.

### 3. *The Riddle Restored*

Herein lies the riddle. The Equal Protection Clause seems to have the necessary focus on equality, but its subject matter is limited to the protection of the laws, and it extends beyond citizens to all persons. The Privileges or Immunities Clause has the right subject matter and the right coverage, because it is about citizens' rights, but it appears to be a substantive limitation, not a ban on discrimination. Neither seems to require equality with respect to the rights of citizenship set out in the Civil Rights Act. How, then, did the Fourteenth Amendment constitutionalize the Act?

The standard response to these textual criticisms is to attribute the difficulties to inept draftsmanship, in particular the sloppiness of Representative John Bingham of Ohio, the principal author of the second sentence of Section 1.<sup>19</sup> This suggests that we simply must live with a gap between the words of the Amendment and the legal rules it enacts. We need not. I offer a reading of Section 1 that is textually sound and that constitutionalizes the Civil Rights Act without writing a uniform national private law into the Constitution. This reading revolves around an unfamiliar way of understanding the Privileges or Immunities Clause, under which it ensures that all the citizens of every state

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18. To take another example, imagine a substantive constitutional provision stating that everyone shall have a right to the protection of personal security. That would not be the same as the Civil Rights Act's rule that citizens of all races shall have the same protection of personal security. A state could comply with the substantive requirement if it made and enforced criminal laws against assault, battery, murder, and so forth. Having done so, it could then give additional tort protection only to some racial group. Such a law would comply with the substantive rule but would violate the Civil Rights Act.

19. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 215-20 (1977) (stating that fact that Privileges or Immunities Clause applies to citizens while other clauses apply to all persons is inexplicable and probably reflects poor drafting).



shall be entitled to the privileges and immunities of state citizenship, thereby mandating equality of rights.

### B. *Other Interpreters*

While such an understanding is unfamiliar, it has significant advantages over current suggested readings of the Privileges or Immunities Clause. Interpreters of the clause fall roughly into two groups: David Currie and everyone else. Only Currie, to my knowledge, maintains that the clause is primarily an antidiscrimination provision.<sup>20</sup> Under his reading, the actual content of the privileges and immunities of citizens of the United States is given by positive law, state and national, rather than by the Fourteenth Amendment. What is crucial is not the content of those rights but the understanding that guaranteeing all citizens their state law rights would constitutionalize the Civil Rights Act. This Article provides an explanation of how the text of the clause can mean what Currie and I say it means, and of how that meaning is rooted in the thought and usage of the Reconstruction Republicans. I also present passages from the legislative history of the Reconstruction era in which the equality-based reading of the Privileges or Immunities Clause was employed, and I give a more extended account of the application of the clause in its antidiscrimination mode.

Other contemporary students of the Privileges or Immunities Clause assume that it is a substantive provision like the First Amendment, and that the trick is to understand the phrase "privileges or immunities of citizens of the United States" as we might try to understand the freedom of speech.<sup>21</sup> Possible meanings generally fall into three classes. Best known are the rights contained in the first eight amendments to the Constitution, stripped of the labels that identify them as pertaining only to the federal government.<sup>22</sup> Next, some commentators maintain that privileges and immunities include constitutionally protected versions of natural rights in a Lockean sense, preeminently rights of private

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20. CURRIE, *supra* note †, at 342-51. Earl Maltz suggests that the notion of "limited absolute equality" was central to Republican thought, EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869*, at 4 (1990), and that it may be reflected in the Privileges or Immunities Clause, *id.* at 92 (Bingham's proposal, the ancestor of the clause, reflected limited absolute equality). Maltz's discussion of the Privileges or Immunities Clause, however, appears to assume that it is entirely substantive; if I understand him correctly, he means to say that the clause provides equal rights in the same way the First Amendment provides everyone with the same protection for freedom of speech. *Id.* at 106-20.

21. Possible readings, all based on the assumption that the clause is entirely substantive, are surveyed in Timothy S. Bishop, Comment, *The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent*, 79 NW. U. L. REV. 142 (1984).

22. The First Amendment has such a label on its face, as does the provision in the Seventh Amendment that prevents any court of the United States from reexamining jury factfinding other than according to the rules of the common law. The Supreme Court held that the other amendments implicitly are limited to the federal government in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

property and liberty of contract.<sup>23</sup> Finally, some have suggested that the phrase requires us to construct a general notion of national citizenship and its rights based on the structure of the Constitution and the relationship that it establishes between government and the individual.

These possibilities can be mixed and matched. Justice Hugo Black maintained that the clause applies the first eight amendments to the states and does nothing else.<sup>24</sup> William Winslow Crosskey took the same view.<sup>25</sup> A more recent exponent of Crosskey's thesis, Michael Kent Curtis, suggests that the privileges and immunities referred to by the clause include the rights of the Bill of Rights, other personal rights contained in the Constitution such as the writ of habeas corpus, and other fundamental rights.<sup>26</sup> The best known critic of Justice Black's view, Charles Fairman, denied total incorporation but evidently thought that, to the extent that the clause has an intelligible meaning at all, it protects those Bill of Rights liberties that qualify as fundamental.<sup>27</sup>

Others emphasize natural rights of property and liberty. Bernard Siegan maintains that the clause embodies a doctrine of natural rights familiar to us from the old-style substantive due process<sup>28</sup> embodied in *Lochner v. New York*.<sup>29</sup> Bruce Ackerman evidently endorses a Lockean reading of the clause's original meaning.<sup>30</sup> John Hart Ely develops a national citizenship theory most

23. Here and elsewhere, when I refer to Lockean rights I mean the kinds of rights widely discussed by those who participated in the 19th-century development of the liberal tradition of which Locke was a source and symbol. I do not mean to imply anything about the actual thought of John Locke.

24. *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting).

25. 2 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1089-95 (1953).

26. MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

27. Fairman first presented his anti-incorporation argument in Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949). Although he agreed that the clause, if it means anything, protects some freedoms contained in the Bill of Rights, Fairman's final position seems to have been one of skepticism. In his account of the framing of the Fourteenth Amendment, Fairman presented Reverdy Johnson's incomprehension concerning the Privileges or Immunities Clause and concluded that "[c]oming from him, that amounted to a certificate that, for purposes of litigation, the privileges and immunities clause did not have a definite meaning." FAIRMAN, *supra* note 9, at 1297.

28. BERNARD H. SIEGAN, *THE SUPREME COURT'S CONSTITUTION* 46-71 (1987). Siegan also suggests that the clause protects some, but not all, of the rights listed in the first eight amendments. *See, e.g., id.* at 117.

29. 198 U.S. 45 (1905).

30. Ackerman intimates a natural rights approach to privileges and immunities in Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419, 1428-30 (1990) (book review) [hereinafter Ackerman, *Grand Inquisition*]. Following his principle of constitutional synthesis, Ackerman elsewhere suggests that the 14th Amendment's original meaning arose from a synthesis with the principles of the Constitution of 1787 and that its meaning today must reflect the founding, the libertarian and egalitarian impulse of Reconstruction, and the rejection of common law categories of property and contract (and hence, presumably, Lockean rights) in the constitutional revolution of the 1930's. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 521-36 (1989) [hereinafter Ackerman, *Constitutional Politics*]. If I understand Ackerman correctly, he regards the Privileges or Immunities Clause as wholly substantive and believes that the Equal Protection Clause is the only equality requirement of Section 1.

Philip Kurland has also suggested that an updated "fundamental rights" reading of the Privileges or Immunities Clause could be used "to define and protect the rights, privileges, and immunities of citizens

extensively: he argues that the privileges and immunities of citizens include "representation-reinforcing" rights that are necessary to ensure a pluralistic political system and to protect political minorities from breakdowns in pluralistic politics.<sup>31</sup>

Other theories of the clause argue that we can find its full meaning by relating it to other parts of the Fourteenth Amendment. Raoul Berger maintains that the Privileges or Immunities and Equal Protection Clauses, taken together, forbid race discrimination with respect to the rights listed in the Civil Rights Act of 1866 and no others. According to Berger, the content of the constitutional rule comes from the concept of privileges or immunities, while its antidiscrimination character comes from the requirement of equal protection.<sup>32</sup> Robert Kaczorowski suggests that Section 1 of the Amendment achieves its full meaning in connection with the enforcement power contained in Section 5, and that together they give Congress power to define and protect rights of national citizenship.<sup>33</sup>

All the substantive readings, however, contain important flaws. First, by focusing on the rights of national citizenship, they ignore the state citizenship guaranteed by the first sentence of Section 1 and therefore provide at most an incomplete account of the citizenship rights protected by the clause. Next, they make it impossible for the Privileges or Immunities Clause to ground the Civil Rights Act. Precisely because they require that the states respect whatever substance the concept of "privileges or immunities" has, they cannot produce the purely equality-based character of the Act, which permits the states to have any private law they like, as long as it is the same for all citizens. The readings that find their content in natural rights or some general notion of citizenship make the clause quite difficult to interpret: it is much harder to read the law of nature than of, say, Georgia. Incorporation is subject to the traditional objection that the phrase "privileges or immunities" seems a rather indirect way of saying something very simple. Finally, all of these readings, by requiring

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in a highly organized service state." Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round At Last?"*, 1972 WASH. U. L.Q. 405, 420; see also Normand G. Benoit, *The Privileges or Immunities Clause of the Fourteenth Amendment: Can There Be Life After Death?*, 11 SUFFOLK U. L. REV. 61 (1976) (modernized Privileges or Immunities Clause doctrine should balance government interest and weight of asserted right).

31. Ely grounds his theory on the claim that

the most plausible interpretation of the Privileges or Immunities Clause is, as it must be, the one suggested by its language—that it was a delegation to future constitutional decision makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding.

ELY, *supra* note 7, at 28. Charles Black's profoundly influential essay on the structural approach to constitutional interpretation also sketches a concept of national citizenship. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 39-51 (1969).

32. BERGER, *supra* note 19, at 18-19.

33. Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 913-17 (1986). Kaczorowski does not suggest that Section 1 has no self-executing effect in the absence of federal legislation. *Id.* at 915.

that the Equal Protection Clause be broad enough to encompass the Civil Rights Act, put weight on that clause that it does not easily bear.

The problematic nature of the clause, and of most of the theories of it that have been put forward, has led some commentators simply to throw up their hands. Fairman intimated such sentiments, but the most prominent prophet of despair is Judge Robert Bork, whose view probably represents the conventional wisdom. He observes that no consensus has ever developed on even the rough outlines of the provision's meaning and suggests that because it is unintelligible we should therefore treat it as we would a provision that was obscured by an ink blot.<sup>34</sup> While I agree that Judge Bork's conclusion follows from his premise, the purpose of this Article is to render that premise obsolete.

### C. Method

The historical discussion that follows will be guided by the riddle posed here: How does the Fourteenth Amendment place the antidiscrimination rule of the Civil Rights Act of 1866 into the Constitution? My answer is that it does so through the Privileges or Immunities Clause. First, the privileges and immunities of state citizenship include the legal rights referred to by the Civil Rights Act. Second, a restriction of a citizen's rights, on a basis that is incompatible with the Reconstruction idea of equality, constitutes an abridgment of rights. The clause therefore ensures that when a state's law defines these rights, it does so in keeping with that idea of equality.<sup>35</sup> I accompany this reading of the Privileges or Immunities Clause with an unfamiliar reading of the Equal Protection Clause, which interprets it as requiring equality only with respect to the protection of the laws, a subset of the functions of government. That subset consists of the remedial aspects of law that protect primary rights. Not only is that subset smaller than all the activities of government, it is smaller than the privileges and immunities of citizens.

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34. BORK, *supra* note 5, at 166; see also Wallace Mendelson, *Raoul Berger's Fourteenth Amendment—Abuse by Contraction vs. Abuse by Expansion*, 6 HASTINGS CONST. L.Q. 437, 451 (1979) (stating that Privileges or Immunities Clause is inspiring, but provides no judicially manageable standards). This conventional wisdom is reinforced by the fact that the most thorough and thoughtful recent study of the 14th Amendment declines to reach a firm conclusion about the original meaning of any part of Section 1. NELSON, *supra* note †.

35. This relatively limited approach might be criticized for trivializing the 14th Amendment by treating it as a mere "superstatute," a change in the constitutional rules, rather than a "transformative amendment" that changes the Constitution's interpretive principles. See Ackerman, *Constitutional Politics*, *supra* note 30, at 521-25. Ackerman's claim that the 14th Amendment is not just a change in the rules, however, seems to rest on the prior conclusion that it is highly vague and general. If I am correct that the Privileges or Immunities Clause has a clearer meaning than orthodoxy supposes, then Ackerman's approach is less plausible. I do not intend to trivialize the 14th Amendment. There is nothing necessarily trivial about a change in the constitutional rules, even if that change is expressed clearly—the 17th Amendment remains important although everyone knows what it means (direct election of senators). Besides, the 14th Amendment, as I understand it, works a deep change in American federalism even if it does not turn federalism on its head.

For each of these interpretations, my claims are twofold. First, I assert that the interpretation that I urge is one that someone in 1866 could have meant by the language of the two clauses. The most important part of the Article concerns this claim with respect to the Privileges or Immunities Clause. In order to make the claim, I have recovered and reassembled the conceptual and terminological building blocks of the equality-based reading. Those building blocks consist of the idea of the privileges and immunities of *state* citizenship—the everyday rights covered by the Civil Rights Act of 1866—and the idea that a state abridges a state law right when it denies that right to a class of citizens, but not when it alters the content of that right equally for all. If we understand the text of the Privileges or Immunities Clause this way, then it forbids Black Codes but does not forbid changes in, for example, the law of real property.

Second, I claim that, in fact, some Republicans adopted the equality-based view of the Privileges or Immunities Clause during Reconstruction. I do not mean to suggest that it was the only reading put forth or accepted. Indeed, I hesitate to attribute to most participants in the framing and ratification of the Fourteenth Amendment any precise notion of the meaning of Section 1, other than that it was designed to forbid Black Codes and constitutionalize the Civil Rights Act of 1866. Similarly, with respect to the Equal Protection Clause, I note that in the nineteenth century, the phrase “the protection of the laws” was used to refer to the rules, institutions, and activities of government that secured rights against invasion. Again, there is evidence that this understanding was common, although probably not universal, among Republicans.

Beyond that, I avoid saying much about broader questions concerning Reconstruction. In particular, this Article asserts nothing (or almost nothing) about the relative strength of conservative, moderate, and radical Republicans during the framing and ratification of the Fourteenth Amendment. Although such questions of political history are common fare, I do not feel competent to address them. Fortunately, it is not necessary to do so in order to recover the equality-based reading of the Privileges or Immunities Clause.

## II. ANOTHER BRIEF HISTORY OF SECTION 1

This part of the Article describes the events leading to the drafting of the Fourteenth Amendment and the legal doctrines that the Amendment’s drafters employed. The next part shows how the Privileges or Immunities Clause can be understood as an antidiscrimination provision that grounds the Civil Rights Act and discusses what the clause seems to have meant to its Republican supporters.

### A. *The Comity Clause*

The concept of privileges and immunities was not new in 1866. Article IV, Section 2 of the original United States Constitution begins: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."<sup>36</sup> This clause forbids the states from giving unfavorable treatment to visiting out-of-state Americans with respect to the body of rights that constitutes the privileges and immunities of state citizenship.<sup>37</sup> From this reading comes the provision's usual name, the Comity Clause.

Two features of the clause as usually understood deserve attention. First, its protections extend only to citizens of American states who are temporarily in other states, but who have retained citizenship in their home state. It has no effect, either substantive or equality-based, on the treatment a state gives its own citizens.<sup>38</sup> Second, the Comity Clause does not impose a complete ban on unfavorable treatment of visiting Americans. Rather, it applies only to the privileges and immunities of citizens, whatever those privileges and immunities may be.

The limitation to privileges and immunities came up in the most famous Comity Clause case of all, one that was often quoted in 1866: *Corfield v. Coryell*.<sup>39</sup> Plaintiff Corfield, apparently a citizen of Delaware, owned a fishing boat called the *Hiram*, which was leased and then subleased to a fisherman, who took her to rake oysters in a part of Delaware Bay claimed by New Jersey.<sup>40</sup> During the fishing expedition, the *Hiram* was seized by an armed New Jersey vessel, taken up the Maurice River to Leesburg, New Jersey, and sold as prize.<sup>41</sup>

Corfield brought a federal diversity action for trespass against Coryell, who had acted as prize master. Coryell claimed that his action was justified under a New Jersey statute that prohibited any person not an "actual inhabitant and

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36. U.S. CONST. art. IV, § 2, cl. 1. The two clauses about privileges and immunities use different conjunctions for reasons of logic. The Article IV provision is an affirmative mandate and therefore gives "privileges and immunities." The second sentence of the 14th Amendment is a prohibition. In order to forbid abridgments of both privileges and immunities, it uses the connective "or," thereby distributing the negation. If it said "and," a strong argument could be made that a law was forbidden only if it abridged both a privilege and an immunity.

37. See, e.g., *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180-81 (1868).

38. The Comity Clause assumes that there is a law of state citizenship without saying what that law is, just as other provisions of the Constitution assume that there is a law of national citizenship without saying what it is. See, e.g., U.S. CONST. art. II, § 1, cl. 6 (President must be natural born citizen). This silence, and the importance of the issue for a variety of questions concerning slavery, made citizenship one of the most hotly contested legal questions in the decades preceding the Civil War. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); see also 10 Op. Att'y Gen. 382 (1862) (free person of color born in the United States is citizen of the United States and eligible to be master of vessel engaged in coasting trade).

39. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

40. *Id.* at 547.

41. At the prize hearing, the *Hiram* was defended by an associate of the sublessee, the sublessee "Keene having escaped under an apprehension of being sued by a person living at Leesburg, to whom he was indebted." *Id.*

resident” of New Jersey from raking for oysters in New Jersey waters from a boat not wholly owned by a New Jersey citizen.<sup>42</sup> Corfield replied that the New Jersey statute was invalid under the Commerce Clause and the Comity Clause, that the jurisdiction of the New Jersey prize court was ousted by the federal admiralty jurisdiction, and that the relevant water was not within the territory of New Jersey.<sup>43</sup>

Justice Bushrod Washington, sitting on circuit, held for the defendant. He rejected Corfield’s Commerce Clause argument, holding that the statute was not a regulation of commerce but an allocation of property rights,<sup>44</sup> and said that federal admiralty jurisdiction did not oust that of the New Jersey court.<sup>45</sup> Justice Washington began his discussion of Corfield’s Article IV claim with a now-famous description of the privileges and immunities of citizens.<sup>46</sup> *Corfield*, however, involved not some well-known fundamental right, but oysters, and Justice Washington found that citizens enjoyed commonly owned

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42. *Id.* at 547-48.

43. *Id.* at 550.

44. *Id.* at 550-51.

45. *Id.* at 552-53.

46. The discussion begins:

The next question is, whether this act infringes that section of the constitution which declares that “the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states?” The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expression of the preamble of the corresponding provision of the old articles of confederation) “the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.”

*Id.* at 551-52.

oysters as property, not privileges or immunities.<sup>47</sup> Thus, the Privileges and Immunities Clause did not provide any basis for Corfield's claim.<sup>48</sup>

In the first half of the nineteenth century, various understandings of the Comity Clause and the concept of privileges and immunities were put forward.<sup>49</sup> The interstate comity reading was very prominent and appears to have

47. It goes on to say:

But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by these citizens; much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens. A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water; and it is equally protected by the laws of the state against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the state. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common to this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed without the tacit consent, or the express permission of the sovereign who has the power to regulate its use.

*Id.* at 552.

48. The constitutional discussion was actually unnecessary. Corfield's action was in trespass; Justice Washington held that it should have been brought in case, because Corfield was not in actual or constructive possession of the *Hiram* when she was captured. *Id.* at 549, 555. (The forms of action are truly fundamental; I am indebted to Gary Lawson for this point.)

The question whether the Comity Clause is limited to comity has been disputed by modern commentators. *See, e.g.,* Charles J. Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1 (1967) (clause gives substantive protection). There is also controversy as to which of these views Justice Washington adopted. *See, e.g.,* SIEGAN, *supra* note 28, at 48-49 (Justice Washington thought the Comity Clause protected citizens against their own states). I think Justice Washington meant to embrace the comity reading. First, the point of the invocation of "fundamental" rights is the distinction between such rights and oysters. Moreover, Justice Washington seems to have been talking about *kinds* of rights when he said that they fall under general categories. Finally, his explanation that the citizens of each state were to enjoy these privileges in every other state, combined with his appeal to the interstate harmony purpose of the provision, reinforces the antidiscrimination reading. Whatever he may have implied in *Corfield*, Justice Washington very likely subscribed at least to the comity reading of the clause. In *Butler v. Farnsworth*, 4 F. Cas. 902 (C.C.E.D. Pa. 1821) (No. 2240), he explained that the Constitution allocated each American a state of citizenship for purposes of federal diversity jurisdiction, even though it also in effect made every citizen a citizen of every state:

With respect to the immunities which the rights of citizenship can confer, the citizen of one state is to be considered as a citizen of each, and every other state in the union. But the privilege of suing in the tribunals of the nation, cannot possibly depend upon the fact of general citizenship, because if it did, the jurisdiction of those tribunals would extend to every case where citizens were parties . . . .

*Id.* at 903. According to the comity reading of the clause, the privileges and immunities of citizens are their rights under state law. This concept of privileges and immunities fits into the interstate equality reading of Article IV because it gives visiting Americans the rights of natives without intruding into the states' power to shape their law. It is also perfectly adapted for an intrastate equality rule, under which every citizen has the same rights, whatever the state determines they shall be. *See infra* notes 147-49, 312-18 and accompanying text.

49. Some Abolitionists sought to devise attacks on slavery based on the clause, more or less knowingly departing from its orthodox meaning in doing so. *See* JACOBUS TENBROEK, *EQUAL UNDER LAW* 94-115 (rev. ed. 1965).



been the mainstream interpretation.<sup>50</sup> Under it, the clause requires states to give out-of-state Americans at least the same privileges and immunities that their own citizens enjoy. The interstate comity reading assumes that privileges and immunities constitute a substantial part of the content of a state's law, especially its basic law of private civil capacity, such as the right to make contracts and to own property.

### B. *The Thirty-ninth Congress*

The Thirty-eighth Congress adjourned on March 3, 1865. The following month General Lee surrendered, Lincoln was assassinated, and Andrew Johnson became President. Under Johnson's "Presidential Reconstruction," most of the former Confederate states formed new governments, ratified the Thirteenth Amendment, and elected Senators and Representatives to the Thirty-ninth Congress, which convened on December 4, 1865. The two Houses refused to seat the Southern Senators and Representatives and created a Joint Committee on Reconstruction in order to formulate their own approach to the postwar crisis of the Union. The nation was given a new fundamental legal rule, and Congress a new power, when on December 18th the Secretary of State proclaimed that the Thirteenth Amendment, with its ban on slavery and congressional enforcement provision, had been ratified.<sup>51</sup>

To understand the origins of the Fourteenth Amendment, we must focus on three aspects of the work of the Thirty-ninth Congress: the Civil Rights Act of 1866, which was introduced in January and passed over the President's veto in April; a proposed constitutional amendment relating to civil rights that was reported by the Joint Committee in February but never voted on in either

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50. According to Story:

It is obvious, that, if the citizens of each state were to be deemed aliens to each other, they could not take, or hold real estate, or other privileges, except as other aliens. The intention of this clause was to confer on them, if one may say so, a general citizenship; and to communicate all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 674 (Durham, Carolina Academic Press 1987) (1883). Chancellor Kent noted that "if [citizens] remove from one state to another, they are entitled to the privileges that persons of the same description are entitled to in the state to which removal is made, and to none other." 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 35 (New York, William Kent, 7th ed. 1851). The interstate comity view was adopted by two state supreme court cases that were frequently cited in discussions of the clause. *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797); *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89 (1887). Antislavery theorist John Codman Hurd apparently recognized that the orthodox view was one of comity, although he seems to have thought that the clause gave all citizens the rights set out in a "pre-existing common law of the colonies." 2 JOHN C. HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 352-53 (Boston, Little, Brown 1858).

51. The Amendment provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII, §§ 1-2.

House; and the Fourteenth Amendment itself.<sup>52</sup> The theme linking these three was equality or, as we might put it today, antidiscrimination.

### 1. *The Civil Rights Act of 1866*

As the Thirty-ninth Congress organized itself, the provisionally reconstructed Southern States were passing the Black Codes, which limited the rights of blacks and freed slaves. Largely in response to these developments, on January 5, 1866, Senator Lyman Trumbull of Illinois, Chairman of the Senate Judiciary Committee, introduced the Civil Rights Bill. The bill was designed to secure equality between blacks and whites in the enjoyment of certain rights basic to ordinary life. Section 1 formed the heart of the bill. In its original form, this section mandated equality with respect to both civil rights in general and as specifically listed.<sup>53</sup>

Senator Trumbull specifically stated that he designed the bill to override discriminatory state laws like the Black Codes. He explained:

Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment.<sup>54</sup>

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52. See generally HORACE E. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908); JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956) [hereinafter JAMES, FRAMING]; JOSEPH B. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT* (1984) [hereinafter JAMES, RATIFICATION]. James' books are especially useful because they describe the 14th Amendment primarily as a political issue and make it possible to understand how the political storms would distract from a detailed legal consideration of the proposal.

53. Section 1 as first introduced provided:

[A]ll persons of African descent born in the United States are hereby declared to be citizens of the United States, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

54. *Id.* Representative James Wilson of Iowa, who introduced the Civil Rights Bill in the House as Chairman of its Judiciary Committee, gave the same account of its basic purpose: "It will be observed that the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States on 'account of race, color, or previous condition of slavery.'" *Id.* at 1118.

He maintained that the Thirteenth Amendment empowered Congress to pass the bill because legal race discrimination constituted a badge of servitude and thus violated the Thirteenth Amendment. More broadly, he stated that the freedom that the Thirteenth Amendment was designed to protect necessarily included equal enjoyment of the basic legal capacities of contract and property and the basic protections of government.<sup>55</sup>

The claim that Congress had such power provoked heated controversy. The Civil Rights Bill, whatever its primary object may have been, was not limited to protecting freed slaves and was not even limited to the states in which slavery had formerly existed.<sup>56</sup> According to its opponents, the new national rule of equal civil rights was nothing but an attempt by Congress to rewrite the states' domestic laws of property, contract, personal security, and so forth.<sup>57</sup> State law, they argued, created citizens' rights; if Congress could legislate upon all matters of state law, it could pass national laws on all those subjects, thereby overthrowing the principle of enumerated powers on which American federalism rested.<sup>58</sup>

Advocates of the Civil Rights Bill responded that it was limited to racial equality and did not represent federal interference with the substance of state law. The states would remain free to create whatever rights they pleased, as long as they gave them to all citizens.<sup>59</sup> Their argument relied on the realiza-

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55. On the first point, Trumbull described the various slavery era restrictions on the rights of blacks in the South and said that "[w]hen the constitutional amendment was adopted and slavery abolished, all these statutes became null and void, because they were all passed in aid of slavery, for the purpose of maintaining and supporting it." *Id.* at 474. After describing the new Black Codes, he went on to argue that "any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited." *Id.* Similarly, Senator Jacob Howard, Republican of Michigan, explained that the Civil Rights Bill provided that with respect to civil rights, "there is to be hereafter no distinction between the white race and the black race. It is to secure to these men whom we have made free the ordinary rights of a freeman and nothing else." *Id.* at 504. The equation of nonslavery with equality reflected Abolitionist notions. See TENBROEK, *supra* note 49, at 159-73.

56. A precursor to the Civil Rights Bill, introduced by Senator Henry Wilson of Massachusetts on December 13, 1865, was limited to the insurrectionary states. See CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865). Wilson's proposal would have nullified all "laws, statutes, acts, ordinances, rules, and regulations" in those states that provided for "inequality of civil rights and immunities" on the basis of race, color, descent, or previous condition of slavery. *Id.* Toward the end of the debate on Senator Wilson's proposal, Trumbull explained that he would propose similar legislation as soon as the 13th Amendment was ratified. *Id.* at 43.

57. See, e.g., *id.* at 1121 (remarks of Rep. Rogers of New Jersey) ("Has Congress the power to enter the domain of a State, and destroy its police regulations with regard to the punishment inflicted upon negroes?").

58. Columbus Delano, a Republican Representative from Ohio, said that the bill declared "in effect that Congress has authority to go into the States and manage and legislate with regard to all the personal rights of the citizen—rights of life, liberty, and property. You render this Government no longer a Government of limited powers . . ." *Id.* at 158 app.

59. The classic answer to Delano was delivered the next day by Samuel Shellabarger, Republican of Ohio. He explained that there was a crucial difference between mandating equality of civil rights and dictating their content:

Now, Mr. Speaker, if this section did in fact assume to confer or define or regulate these civil rights, which are named by the words contract, sue, testify, inherit, &c., then it would, as seems to me, be an assumption of the reserved rights of the States and the people. But, sir, except so

tion that congressional power to require equality did not necessarily have to rest on a claim of plenary federal power to make private law. A power limited to requiring equality would be enough to authorize the bill.<sup>60</sup>

One Republican who shared the doubts about the adequacy of Congress' constitutional power was Representative John Bingham of Ohio, a member of the Joint Committee and the principal drafter of Section 1 of the Fourteenth Amendment.<sup>61</sup> Bingham, a firm abolitionist, favored the policy of the Civil Rights Bill but thought that Congress lacked the power to enact it.<sup>62</sup> These doubts may have been shared by President Johnson, who said that he vetoed the bill on the grounds that it exceeded Congress' power.<sup>63</sup>

These constitutional arguments did not sway the Republican majority. Over the President's veto, they made the bill the Civil Rights Act of 1866. Section 1 provided:

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory

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far as it confers citizenship, it neither confers nor defines nor regulates any right whatever. Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery.

*Id.* at 1293.

60. Robert Kaczorowski reads the congressional debates differently, arguing that the Republicans did indeed claim the power to determine the content of citizens' rights through federal legislation, and that they intended the Civil Rights Bill to do so. Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 YALE L.J. 565, 569-73 (1989). In his view, the bill combined substantive protection for absolute federal rights with a requirement that state laws regulating such rights not discriminate on the basis of race. *Id.* at 572-73. Such a reading, however, makes it difficult to account for statements such as those of Senator Trumbull, who said, "if the State of Kentucky makes no discrimination in civil rights between its citizens, this bill has no operation whatsoever in the State of Kentucky." CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866). Unless the states' power to regulate national rights completely swallows up any other protection those rights may have, it is hard to reconcile Trumbull's statement with absolute national rights. *See also supra* note 59 (statement of Rep. Shellabarger that Civil Rights Bill does not seek to confer, define, or regulate rights, but only to mandate equality).

61. Representative Bingham presents the most exasperating problem faced by anyone who tries to take seriously the words of the second sentence of Section 1 because he seems to have written them without being a man who took words seriously himself. One pair of commentators concluded that Bingham, though able, had "a strong egocentricity and a touch of the windbag. As a legal thinker he was not in the same class with the top notch minds of his time, such as Reverdy Johnson, Lyman Trumbull, Matt Carpenter, or George Edmunds in the Senate, or George Hoar in the House." John F. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131, 164-65 n.169 (1950). Bingham's speeches were highly rhetorical, and his thoughts are hard to follow; he was undoubtedly a gasbag. Whether he was also a gashead is a more difficult and controversial question. My view is that either Bingham's analytical powers were mediocre or he was too lazy to use them.

62. CONG. GLOBE, 39th Cong., 1st Sess. 1291-92 (1866).

63. *Id.* at 1679-80 (veto message). Most prominently, President Johnson claimed that Section 1 dealt with areas solely within the power of the states. "Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States." *Id.* at 1680.

in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.<sup>64</sup>

## 2. *The Joint Committee's First Proposed Amendment*

The concerns regarding congressional power led Bingham to suggest, and the Joint Committee to report, a constitutional amendment designed to give Congress the power to adopt civil rights legislation. Bingham's draft, submitted on February 13, 1866, while the Civil Rights Bill was under consideration, would have amended the Constitution to provide:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.<sup>65</sup>

The amendment was debated in the House and postponed.<sup>66</sup>

Bingham did not explain precisely what the amendment would accomplish, nor did he explicate the text so as to make clear why it would do whatever it did.<sup>67</sup> We can, however, divine two things about his understanding of the

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64. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. The Act as finally adopted differed from Senator Trumbull's initial proposal in two important respects. It protected only citizens, not inhabitants, and it did not open with a general ban on discrimination in civil rights or immunities. The first change probably responded to the concern that otherwise the bill would extend all the rights of citizens to aliens, and in particular that it would permit aliens to hold real property on the same terms as citizens. *See* CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (Sen. Johnson). The second responded to concerns over the general phrase "civil rights and immunities," particularly the fear that it would be found to include the right to vote—something the Republicans hesitated to do. When he discussed the phrase's deletion shortly before the House voted on the bill, Representative James Wilson of Iowa, chairman of the House Judiciary Committee, explained that he did not think the change made a difference, but that it was done to accommodate those who feared that "it might be held by the courts that the right of suffrage was included" in the general phrase. *Id.* at 1366-67. The rest of the Act consists of enforcement provisions that are extremely important for a complete understanding of the Act itself, but do not affect most questions regarding § 1.

65. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

66. The amendment was introduced in the Senate, *id.* at 806, and discussed by Senator Stewart, *id.* at 1082, but never formally debated.

67. Bingham said: "I do not propose at present to detain the House with any very extended remarks in support of [the proposed amendment]. I ask, however, the attention of the House to the fact that the amendment proposed stands in the very words of the Constitution of the United States as it came to us from the hands of its illustrious framers." *Id.* at 1034. Bingham was referring to his use of the words "privileges and immunities of citizens," which come from the Comity Clause, and "life, liberty, or property," which come from the Fifth Amendment. Shortly thereafter, Representative Higby of California reiterated Bingham's point about the sources of the amendment's words. *Id.* at 1054. Representative Hale, commenting on Higby's speech, said: "The ingenuity of the argument was admirable. I never heard it paralleled except in the case of the gentleman who undertook to justify suicide from the Scripture by quoting two texts: 'Judas went and

proposal with as much confidence as is possible where Bingham is concerned. First, however many purposes the amendment may have had, equality was its animating principle. Bingham began his concluding speech by approvingly quoting President Johnson's statement that "the American system rests on the assertion of the equal right of every man to life, liberty, and the pursuit of happiness."<sup>68</sup> That speech's finale, too, was a paean to equality.<sup>69</sup> More specifically, although Bingham's proposal (like Section 1 of the Fourteenth Amendment) never mentioned race, the elimination of race discrimination was very much on his mind. In an exchange with Representative Robert Hale, Republican of New York, Bingham explained that his proposal was not limited to the late Confederate States; rather, it would give Congress power to eliminate race discrimination throughout the country.<sup>70</sup>

Second, it is likely that Bingham thought that *both* clauses of his proposal gave Congress power to forbid discrimination. He regularly ran together the two constitutional provisions from which his proposal derived, the Privileges and Immunities Clause of Article IV and the Due Process Clause of the Fifth Amendment. He praised "these great canons of the supreme law, securing to all the citizens in every State all the privileges and immunities of citizens, and to all people all the sacred rights of persons."<sup>71</sup> Indeed, he included them together when he referred to the "bill of rights."<sup>72</sup> Bingham said that his equal

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hanged himself; 'Go thou and do likewise.'" *Id.* at 1063.

68. *Id.* at 1088-89.

69. He said the Due Process Clause referred to "law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice." *Id.* at 1094. In the 1859 debate on Oregon's admission to the Union, he called equality "the rock on which that Constitution rests—its sure foundation and defense." CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859).

70. In response to Hale's claim that the amendment would operate only in the seceding states, Bingham said that it would apply to other states "that have in their constitutions and laws to-day provisions in direct violation of every principle of our Constitution." CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866). When Bingham said that, Representative Rogers interjected, asking "I suppose the gentlemen refers to the State of Indiana?" *Id.* Bingham replied, "I do not know; it may be so. It applies unquestionably to the State of Oregon." *Id.* Bingham was referring to race discrimination. Rogers mentioned Indiana because the previous day he had pointed out that the amendment would nullify Indiana's ban on immigration and property ownership by blacks. *Id.* at 134 app. Bingham in 1859 had opposed the admission of Oregon, whose proposed constitution forbade immigration by blacks. CONG. GLOBE, 35th Cong., 2d Sess. 982-85 (1859). In his second speech on the proposed amendment Bingham again alluded to that debate, saying that the Constitution had been disregarded in Oregon and the insurrectionary states. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866). His objections to Oregon's admission in 1859 were based on Article IV. CONG. GLOBE, 35th Cong., 2d Sess. 982-85 (1859).

71. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

72. Bingham explained that even opponents of a congressional enforcement power "admit the force of the provisions in the bill of rights that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law . . ." *Id.* at 1089; *see also id.* at 1034 (explaining that earlier draft, based upon Article IV and the Due Process Clause, was necessary because those "great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto on the fidelity of the States"). Fairman thought that Bingham included the Privileges and Immunities Clause within his "bill of rights." *See* Fairman, *supra* note 27, at 5, 26, as did tenBroek, TENBROEK, *supra* note 49, at 212-15. Crosskey thought this interpretation to be merely silly: "Now, who ever heard of a 'bill of rights' consisting of the Privileges and Immunities Clause of the original document, and the Due Process Clause of the Fifth Amendment?" William Crosskey, *Charles*

protection language was about forbidding discrimination, and probably about that alone.<sup>73</sup> He never distinguished the other clause by saying that it had nothing to do with discrimination.

Bingham also made reference to equal rights in discussing the privileges and immunities language of his amendment. In his second and concluding speech on the proposal, Bingham asked: "What does the word immunity in your Constitution mean? Exemption from unequal burdens. Ah! say gentlemen who oppose this amendment, we are not opposed to equal rights; we are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property . . . ."<sup>74</sup> A few moments later, in response to Representative Hale's objections of the previous day, Bingham said: "The gentleman did not utter a word against the equal right of all citizens of the United States in every State to all privileges and immunities of citizens . . . ."<sup>75</sup> Apparently, Bingham thought that his proposal would enable Congress to mandate equal privileges and immunities of citizenship in the states.<sup>76</sup>

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Fairman, "Legislative History," and the Constitutional Limitations on State Authority, 22 U. CHI. L. REV. 1, 27 (1954). In my view, the answer to Crosskey's question is John Bingham.

73. Representative Hale objected to the equal protection provision, fearing that it would give Congress general power to protect life, liberty, and property. CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866). Pressed by Hale, Bingham denied that it went beyond a congressional power to require equality in protection:

Mr. HALE: My question was whether this provision, if adopted, confers upon Congress general powers of legislation in regard to the protection of life, liberty, and personal property.

Mr. BINGHAM: It certainly does this: it confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons.

Mr. HALE: Then will the gentleman point me to that clause or part of this resolution which contains the doctrine he here announces?

Mr. BINGHAM: The words "equal protection" contain it, and nothing else.

*Id.* at 1094.

74. *Id.* at 1089.

75. *Id.*

76. As this implies, Bingham probably thought that Article IV already mandated equality in the rights of state citizenship, and he probably was not alone. Toward the end of the debate on the 14th Amendment, Senator Luke Poland of Vermont said that the Privileges or Immunities Clause reiterated the Privileges and Immunities Clause, without saying exactly what he thought the latter meant. *Id.* at 2961. After quoting Article IV, Poland explained that

radical difference[s] in the social systems of the several States . . . led to a practical repudiation of the existing provision on this subject, and it was disregarded in many of the States. State legislation was allowed to override it, and as no express power was by the Constitution granted to Congress to enforce it, it became really a dead letter.

*Id.* The reference to different social systems seems to mean slavery. If native-born blacks were citizens, a constitutional provision giving all citizens equal privileges and immunities certainly would have eliminated slavery. In his speech introducing the Civil Rights Bill in the House, Representative Wilson said that it rested on the Privileges and Immunities Clause. *Id.* at 1117-18. It is not clear whether he thought that Article IV provided substantive or antidiscrimination protection, but the bill was an antidiscrimination measure.

Oddly enough, Chief Justice Taney in *Dred Scott* seems to have thought that Article IV assumes equal rights among citizens. In order to prove that blacks could not be citizens of any state, Taney argued that if they were, the Privileges and Immunities Clause would entitle them to the *full* rights of citizens whenever they went to another state. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 416-17 (1857). Justice Curtis, in dissent, relied on the more orthodox view of the Comity Clause, under which the states remained free to classify their citizens and could impose the same classifications on visiting Americans. *Id.* at 582-85.

The House's reaction to Bingham's proposal confirms that it was understood as requiring equal rights among citizens. When debate concluded, Roscoe Conkling of New York, a member of the Joint Committee, moved that the amendment be postponed.<sup>77</sup> In support of Conkling's motion, Republican Giles Hotchkiss of New York explained that Bingham's proposal was not properly designed to achieve its goal, which was "to provide that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another."<sup>78</sup> Hotchkiss wished to revise the language because Bingham's draft, which gave a new power to Congress but did not impose a self-executing limitation on the states, could not be regarded as "permanently securing those rights."<sup>79</sup>

Hotchkiss explained to Bingham:

[I]f the gentleman's object is, as I have no doubt it is, to provide against a discrimination to the injury or exclusion of any class of citizens in any State from the privileges which other classes enjoy, the right should be incorporated into the Constitution. It should be a constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation.<sup>80</sup>

The Joint Committee decided that it would have to try again.

### 3. *The Fourteenth Amendment*

That second try became the Fourteenth Amendment. The Amendment was an omnibus proposal that dealt simultaneously with four of the leading problems of Reconstruction: the status of the Civil Rights Bill, apportionment of representatives, suffrage, and eligibility of former rebels for state and federal office.<sup>81</sup> Section 1 of the Amendment addressed the first of those questions.

77. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

78. *Id.* Bingham's equal protection provision was not about citizens' rights.

79. *Id.* Hotchkiss also shared Hale's concern that by giving Congress power to secure equal protection of life, liberty, and property the Bingham amendment would "authorize Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property." *Id.* When Bingham protested, Hotchkiss replied that constitutional provisions should be "so plain it will be unnecessary for courts to give construction to them." *Id.* (Hotchkiss' subversive advice was not followed).

80. *Id.* Hotchkiss asked: "Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as part of the organic law of the land, subject only to be defeated by another constitutional amendment." *Id.*

81. Under the original Constitution, slaves were counted at three-fifths for purposes of apportioning representatives and direct taxes. U.S. CONST. art. I, § 2, *amended by* U.S. CONST. amend. XIV, § 2. Emancipation entitled the ex-slave states to substantially increased representation in the House and the Electoral College. The Republican nightmare was that former rebels would magnify their political power by including ex-slaves in the basis of apportionment while disenfranchising them. *See* CONG. GLOBE, 39th Cong., 1st Sess. 357-58 (1866) (chart prepared by Rep. Conkling showing representation under various suffrage plans). The Amendment also deals with national and rebel debt, but those issues were not of much practical consequence.



What is now the second sentence of Section 1 of the Fourteenth Amendment emerged as the result of a rather disorienting series of votes in the Joint Committee.<sup>82</sup> Apparently the committee had some trouble choosing between a straightforward ban on race discrimination (proposed by Pennsylvania Republican Thaddeus Stevens) and the more delphic language (proposed by Bingham) that eventually was incorporated in the Amendment.<sup>83</sup> While we do not know the exact rationale for the committee's decision, it seems fairly clear that they understood both provisions as incorporating the Civil Rights Act into the Constitution.<sup>84</sup>

The second sentence of Section 1 was approved and ratified as it emerged from the Joint Committee.<sup>85</sup> The congressional discussions of Section 1 show that the provision was designed to require equal civil rights, but no one explained precisely how the language would yield that result. Thaddeus Stevens, chairman for the House of the Joint Committee, introduced the proposal in that chamber. He said that Section 1 would put the Civil Rights Act into the Constitution, but did not explain how, and in particular which part of, the language did the job.<sup>86</sup>

The introductory speech in the Senate was delivered by Jacob Howard of Michigan, who was filling in for the ill William Fessenden of Maine, chairman

82. The journal of the Joint Committee records its votes, but not the debates and informal discussion. JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION, THIRTY-NINTH CONGRESS, FIRST SESSION, S. DOC. NO. 711, 63d Cong., 3d Sess. (1915) [hereinafter JOINT COMMITTEE JOURNAL]. Accordingly, we are left to reconstruct the legal and political concerns that led to a series of decisions that, on the surface, are difficult to follow. Earl Maltz presents a persuasive account of those concerns, and their reflection in the committee's voting process. MALTZ, *supra* note 20, at 79-92.

83. See JOINT COMMITTEE JOURNAL, *supra* note 82, at 28-44. Stevens' draft provided that "[n]o discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." *Id.* at 28. The committee first adopted Stevens' language, *id.* at 29, then added Bingham's provision, *id.* at 35, then deleted Bingham's, *id.* at 36, and finally replaced Stevens' language with Bingham's, *id.* at 39, 44.

84. Earl Maltz points out that while Bingham's proposal was being accepted, rejected, and accepted again, the committee was moving away from mandating black suffrage and toward the compromise contained in § 2 of the 14th Amendment, which reduces a state's representation to the extent that it limits the suffrage of adult males. Maltz suggests that the move from Stevens' individual rights provision, which explicitly mentions race discrimination, to Bingham's formulation, which does not, reflects the Republicans' conclusion that their position in the upcoming 1866 election would be strengthened if they could present their platform as guaranteeing Southern allegiance, rather than solely as providing rights for blacks. MALTZ, *supra* note 20, at 91-92.

85. The only addition to § 1 was what is now the first sentence which, among other things, overrides *Dred Scott*. Without that provision the argument still could have been made, and backed with Supreme Court precedent, that freed slaves were not citizens and hence not protected by the Privileges or Immunities Clause and that the citizenship clause of the Civil Rights Act was *ultra vires*.

86. Stevens said that the Amendment

allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same.

CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). Stevens then moved on to § 2, which he considered "the most important" part. *Id.*

of the Joint Committee for the Senate. Howard provided by far the most detailed discussion of Section 1, saying that the Privileges or Immunities Clause, insofar as he understood it, protected a wide variety of rights, including those listed in *Corfield* and the first eight amendments to the federal Constitution. He said that the Equal Protection Clause would abolish all caste legislation,<sup>87</sup> and stressed that Section 1 would not deal with suffrage.<sup>88</sup> It remained to be seen exactly what would be made of the Amendment.

### III. CITIZENS' RIGHTS

#### A. *Equality and Discrimination*

Orthodox equal protection jurisprudence assumes that the Fourteenth Amendment contains some general principle of equality or antidiscrimination that incorporates the Civil Rights Act of 1866 without mentioning race, color, or previous condition of servitude. That general principle is assumed to be built into the word "equal" in the Equal Protection Clause. Orthodox thinking presents the clause as the means by which the Amendment contains the Act, even though the Amendment's text resembles neither the Act nor a more conventional antidiscrimination provision, such as the Fifteenth Amendment.<sup>89</sup> There are two leading candidates for the general principle of equality. One treats the Equal Protection Clause as if it were a badly drafted marker for a list of antidiscrimination rules.<sup>90</sup> The other suggests that the clause stands for the principle that "arbitrary" or "invidious" decisionmaking is forbidden.<sup>91</sup>

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87. *Id.* at 2765-66. It is not clear whether Howard meant that the Privileges or Immunities Clause would give the rights he listed substantive or antidiscrimination protection. His 1866 speech suggests substantive protection but does not clearly distinguish it from equality. In 1869, when the Senate was discussing a proposal to eliminate race discrimination in voting through legislation pursuant to the Privileges or Immunities Clause, Howard indicated that the clause was directed against the Black Codes. He said that [t]he immediate object of [the Privileges or Immunities Clause] was to prohibit for the future all hostile legislation on the part of the recently rebel States in reference to the colored citizens of the United States who had become emancipated . . . . It was to secure them against any infringement or violation of their rights by those southern Legislatures.

CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869). This suggests that he may have thought the Privileges or Immunities Clause to have mandated equality: the Black Codes were most often denounced for their discriminatory character, and the Civil Rights Act of 1866 struck at them by mandating equality.

88. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

89. The 15th Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. Although the Amendment does not give obvious answers to all questions that arise under it, the basic questions are answered by the text, which identifies the issue on which it operates and states the grounds on which discrimination is forbidden.

90. This is essentially the approach urged by then-Justice Rehnquist in *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting). He wrote that we could, with confidence, identify only race and national origin as prohibited factors. *Id.* at 777-80.

91. This principle is reached by comparing a law that we are fairly certain the clause forbids—for example, one that makes it legal to murder ex-slaves—with one that we are fairly certain the clause permits—for example, the law against homicide itself. There is obviously a reason for discriminating against murderers, whereas we are tempted to call the discrimination against ex-slaves arbitrary, which is to say

Standard equal protection jurisprudence, faced with the inescapably general text of the clause, appeals to a notion of general equality or impartiality in lawmaking. On this score it is historically sound. The Republicans who dominated the Thirty-ninth Congress did indeed conceive of such a notion, one that would preserve state control over the content of law while demanding that the laws apply to all citizens equally. Most of them seem to have thought that the principle of racial neutrality was derived from this more general principle that all citizens should have the same rights.

We can begin to see this by examining the Civil Rights Act of 1866. The Act banned discrimination by saying that citizens were to have the same rights.<sup>92</sup> The original draft of the Act is even more striking. It began with an explicit ban on race discrimination,<sup>93</sup> and then moved seamlessly to mandate that "the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . , shall have the same right [to make contracts and so forth]"<sup>94</sup>—not the same rights *as white citizens*, which would limit the equal rights principle to racial neutrality, but simply the same rights. While that latter mandate follows an ordinary ban on race discrimination and seems to be one because it mentions race, syntactically it is not: the modifying clause "of every race and color" does not limit the general statement that all citizens shall have the same rights.<sup>95</sup>

Such an emphasis on general equality should not be surprising, because the Republicans were fond of speaking in such terms. Senator Trumbull made the general principle of equal rights, not racial neutrality per se, the basis of the Civil Rights Act itself. Trumbull said of the Black Codes, "[A]ny statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which by the Constitution is prohibited."<sup>96</sup>

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that the only reason we can think of for having it is hostility to ex-slaves, something that has nothing to do with murder. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring) (suggesting that the clause requires that legal classifications have a "rational basis").

92. It provided that all citizens "of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right [to make contracts and so forth] *as is enjoyed by white citizens* . . ." Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (emphasis added).

93. "[T]here shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery . . ." CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

94. *Id.*

95. Similarly, a proposed constitutional amendment introduced by Thaddeus Stevens in December 1865 moved easily from general equality to a specific antidiscrimination rule: "All national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color." *Id.* at 10.

96. *Id.* at 474. In a sarcastic response to Garrett Davis, a Democrat from Kentucky and probably the most bitter opponent of the Republican program in the Senate, Trumbull said of the Civil Rights Act:

It is a bill providing that all people shall have equal rights. Is not that abominable? Is that not iniquitous? . . . It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional!

*Id.* at 599.

Trumbull derived his ban on race discrimination from the more general principle of the equality of citizens.<sup>97</sup>

The rhetoric of general equality was also common in the debates on the Fourteenth Amendment. Representative Henry Raymond, Republican of New York, explained that Section 1 "secures an equality of rights among all the citizens of the United States."<sup>98</sup> When he introduced the Fourteenth Amendment in the Senate, Senator Howard said that Section 1 "establishes equality before the law," and that "[w]ithout this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government."<sup>99</sup>

This doctrine of general equality meant, as Thaddeus Stevens put it, that "the law which operates upon one man shall operate *equally* upon all."<sup>100</sup> It said nothing, however, about the content of that law. This point was important because opponents claimed that the Civil Rights Bill intruded into the reserved powers of the states concerning the rights of property, contract, and so forth.<sup>101</sup> In response, Republicans contended that the states still would be able to give their citizens whatever rights they liked, as long as everyone got them.<sup>102</sup> This meant that equality provisions maintained the basic structure of American federalism.<sup>103</sup> Although a national principle of equality would im-

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97. This general principle was also raised by other Republicans during the debate over the Civil Rights Act. Senator Henry Lane, Republican of Indiana, defended the Act on the grounds that the freedmen "are free by the constitutional amendment lately enacted, and entitled to all the privileges and immunities of other free citizens of the United States." *Id.* at 602. Representative William Windom, Republican of Minnesota, praised the Civil Rights Act because it rested on the true republican principle of "the absolute equality of rights of the whole people, high and low, rich and poor, white and black." *Id.* at 1159.

98. *Id.* at 2502. Raymond explained that he had favored the policy of the Civil Rights Bill because he "was in favor of securing an equality of rights to all citizens of the United States," but voted to sustain the President's veto, because he doubted Congress' power to pass it. Raymond "very cheerfully" supported the 14th Amendment because it would resolve those doubts. *Id.*

99. *Id.* at 2766.

100. *Id.* at 2459.

101. *See, e.g., id.* at 478 (Sen. Saulsbury); *id.* at 158 app. (Rep. Delano).

102. Trumbull said:

The bill neither confers nor abridges the rights of any one, but simply declares that in civil rights there shall be an equality among all classes of citizens, and that all alike shall be subject to the same punishment. Each State, so that it does not abridge the great fundamental rights belonging, under the Constitution, to all citizens, may grant or withhold such civil rights as it pleases; all that is required is that, in this respect, its laws shall be impartial.

*Id.* at 1760. Likewise, Representative William Lawrence, Republican of Ohio, made the distinction between substance and equality, stressing that the Civil Rights Bill did "not confer any civil right, but so far as there is any power in the states to limit, enlarge, or declare civil rights, all these are left to the States." *Id.* at 1832. Rather, the bill required that "whatever of certain civil rights may be enjoyed by any shall be shared by all citizens." *Id.*

103. As William Nelson notes, the "interpretation of section one [of the Fourteenth Amendment] as a guarantee of equal rather than absolute rights solved the Republican dilemma of wanting to give Congress power to protect rights without giving it power to destroy state legislative freedom." NELSON, *supra* note 7, at 117.

pose a significant new limit on the states, it was still a far cry from actual centralization.<sup>104</sup>

The Republican concept of general equality thus distinguished between the content of citizens' rights and the decision as to who would enjoy those rights. This distinction has its sharpest and most important application with respect to laws that explicitly modify the rights of one group of people. As Senator Howard explained, the purpose of the Fourteenth Amendment was to put an end to such laws, to "abolish[] all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another."<sup>105</sup> The concern with "class" or "caste" legislation, laws that say which citizens shall have which rights, seemed quite natural during early Reconstruction because it was exemplified in the immediate target of the Civil Rights Act of 1866 and Section 1 of the Fourteenth Amendment: the Black Codes.

The Black Codes generally modified the rights of freed slaves in a straightforward way and thus directly violated the principle of general equality. Laws that contained special limitations on freedmen's capacities as witnesses in court were common.<sup>106</sup> A Mississippi law that especially infuriated the Republicans directly distinguished the content of rights according to which class would exercise them. It granted blacks the property rights enjoyed by white persons but forbade them from renting or leasing lands or tenements "except in incorporated towns or cities in which places the corporate authorities shall control the same."<sup>107</sup> The Black Codes were archetypes of unequal legislation.

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104. The debates also reflect the observation that specific antidiscrimination provisions leave the states in control of the content of civil rights. Republican Samuel Shellabarger of Ohio defended the Civil Rights Bill on this theory:

Now, Mr. Speaker, if this section [Section 1] did in fact assume to confer or define or regulate these civil rights, which are named by the words contract, sue, testify, inherit, &c., then it would, as seems to me, be an assumption of the reserved rights of the States and the people. But, sir, except so far as it confers citizenship, it neither confers nor defines nor regulates any right whatever. Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery.

CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866).

105. *Id.* at 2766.

106. The Alabama Code of 1867 provided that "[f]reedmen, free negroes and mulattoes are competent to testify only in open court, and only in cases in which freedmen, free negroes and mulattoes are parties, either plaintiff or defendant, and in civil and criminal cases, for injuries in the persons or property of freedmen, free negroes or mulattoes." ALA. CODE § 2680 (1867); *see also* Act of Dec. 15, 1865, tit. 31, § 3, 1865 Ga. Laws 239; Act of Feb. 28, 1866, ch. 24, 1866 Va. Acts 89-90.

107. Act of Nov. 25, 1865, § 1, 1865 Miss. Laws 82. Senator Henry Wilson of Massachusetts denounced this law as a violation of the principle of "equality of civil rights and immunities." CONG. GLOBE, 39th Cong., 1st Sess. 111 (1865).

## B. *The Text of the Privileges or Immunities Clause*

To see how the language of the Privileges or Immunities Clause implements the principle of general equality with respect to the rights of citizens, we must understand more clearly the vocabulary of Reconstruction.

### 1. *The Privileges and Immunities of Citizens*

#### a. *State or National Rights?*

The Privileges or Immunities Clause protects the privileges or immunities of citizens of *the United States*. The Supreme Court's reading of the clause rests on these last words. That reading was announced, and the clause effectively banished from the Constitution, in the *Slaughter-House Cases*.<sup>108</sup> In 1869, the Louisiana legislature created the Crescent City Live-Stock Landing and Slaughter-House Company, authorized the company to erect a slaughterhouse that would be open to all butchers at set fees, and forbade anyone from slaughtering animals anywhere else in a three-parish area around New Orleans.<sup>109</sup> The butchers who were not part of the monopoly company complained that the law abridged their privileges or immunities of citizenship by forbidding them to practice their calling in their own establishments.<sup>110</sup>

Justice Miller, writing for the Court, maintained that under the Constitution "there is a citizenship of the United States, and a citizenship of a State," which bring with them different privileges and immunities of citizenship.<sup>111</sup> The butchers' argument failed, he said, because it assumed that "the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same," even though "[t]he language is, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States*'"<sup>112</sup>—that is, the distinctive rights of national citizenship. Since no one suggested that it was a right of specifically national citizenship to be a butcher, Justice Miller felt that the Court was "excused from defining the privileges and immunities of citizens of the United States which no State can abridge."<sup>113</sup>

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108. 83 U.S. (16 Wall.) 36 (1873).

109. *Id.* at 59-60.

110. *Id.* at 66. They also claimed that the monopoly violated the 13th Amendment, the Due Process Clause, and the Equal Protection Clause. *Id.*

111. *Id.* at 74.

112. *Id.*

113. *Id.* at 78-79. In order to repel the suggestion "that no such privileges and immunities are to be found if those we have been considering are excluded," *id.* at 79, Justice Miller gave some examples. It is a right of national citizenship to come to the seat of the national government in order to transact business with that government and to use the navigable waters of the United States. Likewise it is a national right to peaceably assemble and petition for the redress of grievances and to claim the writ of habeas corpus. *Id.* at 79-80.

If that conclusion was right, then the clause cannot protect state positive law rights of property, contract, and so forth.

Justice Miller was wrong. His interpretation depends on italics that, like many other things concerning the Fourteenth Amendment, appear in the *United States Reports* but not in the Constitution. Those italics are doubly misleading. First, by saying that the clause relates to the privileges or immunities of citizens of *the United States*, they silently introduce the assumption that the clause protects a class of rights—the privileges or immunities of citizens of the United States, rather than a group of people—the citizens of the United States, whose privileges and immunities may not be abridged. Without this move, Justice Miller's position is very shaky. If the Constitution says that a state may not abridge the privileges or immunities of a particular group of citizens, then the state may not abridge any of that group's privileges or immunities, no matter which citizenship those rights are associated with.

Second, although Section 1 recognizes that there are separate citizenships of the states and the United States, the Amendment does not divide those citizenships, but staples them together. Every citizen of the United States who resides in a state is a citizen of that state and therefore has the privileges and immunities of state citizenship by operation of the Constitution. This makes the possession of the rights of state citizenship into a right of national citizenship. Justice Miller acknowledged this when he said that national citizenship rights include the acquisition of state citizenship and the rights thereof through residence.<sup>114</sup> It is thus virtually impossible to avoid the conclusion that, as Senator George Boutwell put it, "[a]s a citizen of the United States, the first right of the citizen of the State is that he shall enjoy all the privileges and immunities of a citizen of the State."<sup>115</sup>

Furthermore, the majority's reading makes the substance of the clause redundant. As Justice Field explained in his *Slaughter-House* dissent, before the Fourteenth Amendment was adopted no one would have thought that a state could abridge the national privileges or immunities that Justice Miller discussed. The Supremacy Clause already protected federal rights.<sup>116</sup> While a constitutional amendment may amount to a truism, we generally prefer to avoid such a construction.

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114. "One of these privileges [of national citizenship] is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." *Id.* at 80.

115. 2 CONG. REC. 4116 (1874) (debate on Civil Rights Act of 1875).

116. Justice Field said that if the clause refers only

to such privileges and immunities as were before its adoption specifically designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws . . . .

83 U.S. at 96 (Field, J., dissenting). It is more plausible to argue that the real point of this part of § 1 is to be found in § 5, which empowers Congress to enforce the provisions of the Amendment. Even on this view, however, the clause is strangely drafted, because its purpose is hidden elsewhere.

The natural interpretation of the text is that the privileges and immunities of citizens of the United States include the privileges and immunities of both of the citizenships that the Constitution confers. But what are the privileges and immunities of state citizenship, and what can it possibly mean to say that a state may not abridge a right defined by its own laws?

b. *State Privileges or Immunities as Positive Law Civil Rights*

The privileges and immunities of state citizenship are rights like, and probably consist mainly of, those listed in the Civil Rights Act of 1866. Those are private law rights of property ownership, contractual capacity, and personal security, and access to governmental mechanisms that protect those primary rights. The saliency of state private law rights appears first of all from a comparison of the Act with the leading authority on the substance of privileges and immunities, *Corfield v. Coryell*.<sup>117</sup> The Civil Rights Act guaranteed racial equality with respect to the basic rights of the common law. According to *Corfield*, the Comity Clause guarantees interstate equality with respect to the privileges and immunities of citizens. These privileges and immunities closely foreshadow the common law rights protected by the 1866 Act.<sup>118</sup> Someone who started with *Corfield* could easily end up drafting the Civil Rights Act.

The debates on the Act and the Amendment reflect this near equivalence, sometimes suggesting that the words "rights," "privileges," and "immunities" were almost interchangeable. The original draft of the Civil Rights Act forbade discrimination as to "civil rights or immunities."<sup>119</sup> When he introduced the bill, Senator Trumbull complained that the Black Codes "depriv[ed] persons of African descent of privileges which are essential to freemen."<sup>120</sup> A few moments later, in order to enumerate the fundamental civil rights that accompanied free citizenship, he turned to the Comity Clause and specifically to Justice Washington's list of privileges and immunities in *Corfield*.<sup>121</sup>

Similar usage was common. Representative Henry Raymond of New York supported the Fourteenth Amendment in part because he favored giving freedmen "the rights, privileges, and immunities of other citizens of the United States, whatever those rights may be."<sup>122</sup> Senator Lane of Indiana claimed

117. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

118. Justice Washington, who heard the case while riding circuit, said that the privileges and immunities of citizens may be

comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . [including the right] to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal . . . .

*Id.* at 551-52.

119. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

120. *Id.*

121. *Id.* at 474-75 (quoting *Corfield*).

122. *Id.* at 2512.



that the Civil Rights Act was proper because, after emancipation, freedmen were "free by the constitutional amendment lately enacted, and entitled to all the privileges and immunities of other free citizens of the United States."<sup>123</sup> Speaking in opposition to the Fourteenth Amendment, Democratic Representative Andrew Jackson Rogers of New Jersey complained that "all the rights we have under the laws of the country are embraced under the definition of privileges and immunities."<sup>124</sup>

Despite Representative Rogers' hyperbole, nineteenth-century usage concerning political participation confirms the close connection between privileges and immunities and civil rights: neither was thought to extend to political rights, such as voting or serving on juries.<sup>125</sup> Political rights were commonly distinguished from civil rights, and only a subset of the citizens had the right to participate politically.<sup>126</sup> Justice Washington's suggestion that the right to vote was a privilege of citizenship under the Comity Clause appears to have been the minority view.<sup>127</sup> Most Republicans agreed that neither civil rights nor privileges and immunities included political rights,<sup>128</sup> and legal usage generally appears to have reflected this approach.<sup>129</sup>

123. *Id.* at 602.

124. *Id.* at 2538. Although some Republicans would have argued that Rogers' assertion was too sweeping, none would have denied that the privileges and immunities of citizens included a great many of their basic, everyday legal rights.

125. It is difficult to be sure whether the concepts of civil rights and of privileges and immunities of citizenship, which overlapped substantially, were simply synonymous. The problem arises in part because "privileges and immunities of citizenship," unlike "civil rights," was already a legal term in 1866, due to the Comity Clause. Civil rights, by contrast, appeared in more general political discourse.

126. The dominant view appears to have been the one assumed by Senator Stephen Douglas in 1850, when he explained that free blacks in Illinois were "protected in the enjoyment of all their civil rights" but were "not permitted to serve on juries, or in the militia, or to vote at elections; or to exercise any other political rights." CONG. GLOBE, 31st Cong., 1st Sess. 1664 (1850).

127. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230). *Contra* *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. 1797) (franchise and holding office not among privileges and immunities under Article IV); *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89, 92 (1827) (visiting Americans become naturalized in new state and acquire right to vote and hold office after satisfying residence requirement).

128. The provision in the Civil Rights Bill forbidding discrimination in "civil rights and immunities" was removed in the House in order to allay fears that it would be construed to include the franchise. CONG. GLOBE, 39th Cong., 1st Sess. 1366 (1866). House Judiciary Committee Chairman Wilson explained that this had been done in an abundance of caution. *Id.* Most Republicans seem to have agreed with Representative Thayer, who said, "[T]he words themselves are 'civil rights and immunities,' not political privileges; and nobody can successfully contend that a bill guarantying simply civil rights and immunities is a bill under which you could extend the right of suffrage, which is a political privilege and not a civil right." *Id.* at 1151. In 1869, Senator Howard denied that the Privileges or Immunities Clause included voting, on the grounds that the same language in the Comity Clause did not. CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869).

129. In *Ex parte Virginia*, 100 U.S. 339 (1880), a companion to *Strauder v. West Virginia*, 100 U.S. 303 (1880), the Court upheld an indictment of a Virginia state judge who was accused of violating § 4 of the Civil Rights Act of 1875, which forbade states from discriminating on the basis of race in jury selection. The Court held that race discrimination in jury selection violated the equal protection rights of black defendants. Justice Field dissented, arguing that jury service was a political, not a civil, right, and therefore was not secured by the Privileges or Immunities Clause. 100 U.S. at 365-66. He noted that American citizens visiting other American states were not entitled to serve on juries under the Comity Clause. *Id.* at 366. Field then rejected the majority's conclusion that race discrimination in jury selection denied equal protection to a defendant who was a member of the excluded class, arguing that such a conclusion would imply that female and alien defendants would be entitled to have women and aliens on their juries. *Id.* at 367.

The privileges and immunities of state citizenship thus consisted of the rights protected under the traditional reading of the Comity Clause. These rights are not minimum Lockean freedoms but rather a full specification of state law on basic subjects. Senator Trumbull relied on the standard theory of the Comity Clause, and the positive law notion of privileges and immunities that accompanies it, in explaining the Civil Rights Bill. He said that the bill would apply the Comity Clause rule of interstate equality *within* the states, noting that Article IV gave the same rights to visiting Americans from out of state that were given to local citizens.<sup>130</sup> He then cited an Indiana case for the proposition that the Comity Clause “gives to every person who is a citizen of one of the States the same rights to hold property, the same personal rights, that the citizen of that State has.”<sup>131</sup>

After the obligatory quotation from *Corfield*, Senator Trumbull maintained that the principle of the Comity Clause should be applied within states: “Now, sir, if that be so, this being the construction as settled by judicial decisions to be put upon the clause of the Constitution to which I have adverted, how much more are the native-born citizens of the State itself entitled to these rights!”<sup>132</sup> Those were said to be rights defined by the state’s own laws.<sup>133</sup>

Senator Trumbull’s thinking was fairly clear. Representative Bingham’s was far from that, but he seems to have agreed that the privileges and immunities of citizens of the United States, as protected by the Comity Clause and the Fourteenth Amendment, included rights defined by state law.<sup>134</sup> Bingham, in

130. Trumbull said:

There have been several decisions of courts upon this clause of the Constitution. It was decided by the general court of the State of Maryland (Chase and Duval, justices) that this section [the Comity Clause] meant that the citizens of all the States should have the peculiar advantage of acquiring and holding real as well as personal property, and that such property should be protected and secured by the laws of the State in the same manner as the property of the citizens of the State is protected.

CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

131. *Id.*

132. *Id.* at 475.

133. It is noteworthy that at times Senator Trumbull spoke as though he believed in absolute natural rights, although he clearly was advocating an equality measure. He said that the Comity Clause secured “[s]uch fundamental rights as belong to every free person.” *Id.* at 474. Despite that statement, the rights Senator Trumbull was referring to were precisely those rights protected by the specific law of some state. The Maryland and Indiana cases he cited held that the out-of-state American was to receive the same rights as the in-state citizen. A few days later, Trumbull recognized that point in response to criticism from Garrett Davis: Trumbull said that the cases he cited “relate entirely to the rights which a citizen in one State has on going into another State, and not to the rights of the citizens belonging to the State. I never denied that.” *Id.* at 600. The Civil Rights Bill, which Trumbull was advocating, was an equality provision that gave blacks the same rights as whites, rather than some set of minimum rights.

134. Bingham’s understanding of Article IV, and of the content of privileges and immunities, is difficult to unravel because he sometimes spoke as if the Privileges and Immunities Clause protected rights of national citizenship as opposed to rights of state citizenship. Bingham made this point as part of his theory that Article IV contained an “ellipsis”—the omission of “of the United States” in its reference to privileges and immunities of citizens. *See* CONG. GLOBE, 39th Cong., 2d Sess. 450 (1867) (admission of Nebraska); CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (need for amendment to secure equal protection); CONG. GLOBE, 37th Cong., 2d Sess. 1639 (1862) (suffrage in the District of Columbia); CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859) (admission of Oregon). The only right Bingham ever explicitly identified as one of

1859, said that the proposed constitution of Oregon violated Article IV because it discriminated against blacks with respect to the most important common law rights. These rights later would appear in the Civil Rights Act of 1866.<sup>135</sup> During the 1867 debate on Nebraska's admission to the Union, Bingham spoke of Article IV as if it required equality in state law matters.<sup>136</sup> This understanding of the content of privileges and immunities matches Bingham's indications that both clauses of his original proposal were equality requirements.<sup>137</sup>

This is not to suggest that everyone who participated in framing and ratifying the Fourteenth Amendment thought that the privileges or immunities of citizens consisted of rights defined by state positive law. Some thought that the phrase referred to Lockean natural rights defined without reference to the law of any state.<sup>138</sup> But the positive law, antidiscrimination reading of the concept was very common, and, against the background of the orthodox reading of the Comity Clause, it was probably the dominant view.<sup>139</sup> We are therefore

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distinctively state citizenship, in 1859 or later, was the franchise. CONG. GLOBE, 37th Cong., 2d Sess. 1639 (1862); CONG. GLOBE, 35th Cong. 2d Sess. 985 (1859).

135. The proposed constitution provided: "No free negro or mulatto, not residing in this State at the time of the adoption of this constitution, shall ever come, reside, or be, within this State, or hold any real estate, or make any contract, or maintain any suit therein . . . ." CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859). Equality of rights was the leading theme of Bingham's attack on the provision. *Id.* at 985.

136. The proposed Nebraska Constitution limited the franchise to white citizens. The House was considering a bill admitting Nebraska on the condition that it never deny the franchise on the basis of race or color. Bingham explained that he planned to vote for the bill even though he thought the condition to be beyond Congress' power and hence a nullity. Those who maintained that the condition on Nebraska's admission would be legally effectual pointed to conditions imposed on the admission of Missouri. *See* Res. of Mar. 2, 1821, 3 Stat. 645. Bingham's response was that the Missouri conditions were merely cumulative of the Constitution and hence of no independent effect:

It is urged also that States have been admitted upon the condition that non-resident citizens of the United States should be subject to no other or higher rate of tax than resident citizens or be denied the immunities or privileges of citizens therein. But this is simply a carrying out of that provision of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens" [of the United States] (supplying the ellipsis) "in the several States."

CONG. GLOBE, 39th Cong., 2d Sess. 450 (1867) (brackets in original).

137. *See supra* notes 71-76 and accompanying text.

138. *See, e.g.,* NELSON, *supra* note †, at 24-27 (some antebellum theorists believed that citizens' rights inherent in a free republic included natural rights); TENBROEK, *supra* note 49, at 95-100 (abolitionists often identified rights of citizens with natural rights). It would be folly, however, to take every reference to natural rights as rejecting the notion that the rights of citizens are to be found in the positive law. On the contrary, it would have been natural in the 19th century to say that the privileges and immunities of American citizens were their natural rights, even though those privileges and immunities were found in the positive law, because it was generally assumed that federal and state law were built around natural rights. *See infra* note 140 (Sen. Sherman, suggesting that privileges and immunities of citizens are common law rights). To say this would not imply that the privileges and immunities of American citizens were their natural rights *by definition*; rather, it would be true because of the content of American law. It is thus quite possible that people frequently referred to positive law rights as natural rights. This may seem odd, but if you believe in a natural right to contract, then you believe that a state's positive law of contract protects that natural right. Indeed, if you believe in natural rights without believing that they are necessarily reflected in positive law, you may be more likely to refer to positive law rights of contract as the natural right to contract, because it is in the positive law that the natural right becomes meaningful.

139. Kent and Story adopted the orthodox view of the Comity Clause. *See supra* note 50. Cooley endorsed the antidiscrimination reading of Article IV in his treatise, the first edition of which was published in 1868. THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 15-16 (Boston, Little, Brown & Co. 1868).

justified in reading the Fourteenth Amendment as including positive law rights of state citizenship within the scope of the privileges and immunities of citizens.<sup>140</sup>

## 2. *Abridgment*

The principal textual argument favoring a substantive reading of the Privileges or Immunities Clause is that it would be senseless to prohibit a state from abridging a right that is defined under state law; power over a right's content implies the power to change the right at will. This reading gains support from the language of the First Amendment: if Congress can specify the content of the freedom of speech, Congress surely must have the power to abridge it.

A closer examination of the Constitution, however, reveals a reference to the abridgment of a right whose substance is under the states' control. Section 2 of the Fourteenth Amendment reduces the representation in Congress of any state if the right to vote of its male citizens older than 21 is "denied . . . or in any way abridged."<sup>141</sup> The right to vote is clearly associated with organized government. Where there is no government there is no voting.<sup>142</sup> Moreover,

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Justice Curtis assumed that the Comity Clause governed the state law rights of state citizenship in his dissent in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 583-84 (1857) (Curtis, J., dissenting), as he had when writing for the full Court a year earlier in *Conner v. Elliott*, 59 U.S. (18 How.) 591 (1856) (distinguishing between property rights attached by Louisiana to contract based on place of contracting and rights attached to citizenship). The Court reiterated this interpretation in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), explaining that, for example, the clause gives out-of-state Americans "the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property." *Id.* at 180. A few years after the 14th Amendment was adopted, a leading Republican lawyer and Senator from Wisconsin, Matthew Carpenter, explained that the Comity Clause dealt only with state law rights and permitted states to discriminate among citizens. CONG. GLOBE, 42d Cong., 1st Sess. 576 (1871).

140. Early in the 39th Congress, Republican Senator John Sherman of Ohio employed the orthodox understanding of the rights the Comity Clause protects: "This clause gives to the citizen of Massachusetts, whatever may be his color, the right of a citizen of South Carolina, to come and go precisely like any other citizen." CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865). Republicans also relied on the standard Comity Clause concept of privileges and immunities during the 1859 debate over the admission of Oregon. The proposed Oregon Constitution forbade the immigration of free blacks. Representative Henry Dawes, Republican of Massachusetts, thought that the provision was unconstitutional under the Comity Clause. He explained that Massachusetts had many black citizens, and that under Article IV they had "all the rights and privileges and immunities in the State of Oregon that every citizen of that State has." CONG. GLOBE, 35th Cong., 2d Sess. 975 (1859). (Although Dawes and Sherman regarded the Comity Clause as referring to the specific privileges and immunities of state citizenship, they adopted the unorthodox view under which the privileges and immunities of state citizenship consisted of a body of rights defined without respect to personal characteristics such as race, so that a black citizen of Massachusetts visiting South Carolina would have the rights of a white South Carolinian. See *supra* note 76 and accompanying text (Chief Justice Taneney's argument in *Dred Scott*).)

141. U.S. CONST. amend. XIV, § 2. The right to vote would be abridged but not denied if, for example, freed slaves' votes were counted at one-half, or if they were allowed to vote only for certain offices. See, e.g., CONG. GLOBE 39th Cong., 1st Sess. 2767 (1866) (Sen. Howard) (state would abridge right to vote if it permitted a person to vote for the state legislature but not Congress).

142. According to Representative Wilson, suffrage "is not a natural right, for where natural rights alone obtain there is no right of suffrage." *Id.* at 173.

the right to vote is largely a subject of state, not federal, law.<sup>143</sup> A state defines the right of its electors to vote when it decides on the terms of its officers, and when it decides which ones shall be elected by popular vote. If all legislation that affected voting rights abridged the right to vote, then no state would have any representation in the House. All political systems have laws that define and thus in some sense limit voting rights.

The wording of the Fourteenth Amendment thus presupposes that one can speak meaningfully of abridging a right defined by a state's positive law, and therefore that one can tell the difference between a change in the content of the right and an abridgment. Moreover, the historical context of Section 2 provides the classic instance of abridgment: restriction based on race, color, or previous condition of servitude. The concept of abridgment reflects the Republican notion of equality, which distinguishes between laws that set out the content of rights and laws that take rights away from a class of individuals. The Civil Rights Act of 1866 spoke to the latter. A state that established the same rights for all races was not affected by the Act.

Usage in 1866 supports the claim that "abridgment" was understood in this way. Legislators described the Black Codes as abridging or limiting rights, even though Republicans repeatedly asserted, and the Civil Rights Act assumed, that the states had control over the content of those rights. Senator Timothy Howe, Republican of Wisconsin, advocated the Fourteenth Amendment in a denunciation of the Black Codes by complaining that they abridged the privileges and immunities of classes of citizens.<sup>144</sup> Similarly, Senator Trumbull complained that the Black Codes "deny [the freedmen] certain rights."<sup>145</sup> Senator Howard denounced the codes, asking, "Is a freeman to be deprived of the right of acquiring property, of the right of having a family, a wife, children, home?"<sup>146</sup> Representative Wilson argued that the Civil Rights Act would combat state deprivations of rights: "And should a State enact laws and attempt to enforce them which shall deprive the citizens of the United States of those [rights of life, liberty, and property], may we not intervene to protect them in spite of the

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143. This is unquestionably true with respect to state offices, whatever the extent of Congress' power over federal elections. *See* U.S. CONST. art. I, § 4 (Congress may regulate times, places, and manner of electing Senators and Representatives).

144. Howe was appalled that the insurrectionary states presented themselves for representation in Congress and at the same time abridged their citizens' rights through race-based discrimination. After quoting § 1, he asked:

Does any one on this floor desire to reserve to any State the right to abridge the privileges or immunities of citizens? . . . Is it done in any of the States represented here? I cannot deny it for all of them; but for many of them I do happen to know that no such abridgment of privileges or immunities is tolerated. Is it necessary, however, to incorporate such an amendment into your Constitution? Do you find in any of these communities seeking to participate in the legislation of the United States an appetite so diseased as seeks to abridge these privileges and these immunities, which seeks to deny to all classes of its citizens the protection of equal laws? Yes, Mr. President, I am sorry to say, we do find just such an appetite . . . .

CONG. GLOBE, 39th Cong., 1st Sess. 219 app. (1866).

145. *Id.* at 474.

146. *Id.* at 504.

laws of the State?"<sup>147</sup> The Republicans thought that to abridge or restrict rights was different from changing their content. The latter was ordinary lawmaking; the former was caste legislation.

### 3. *Forbidding Abridgments of Privileges or Immunities*

The previous discussion provides us with a clearer insight into the language of the Privileges or Immunities Clause. The privileges and immunities of state citizenship include those rights of state positive law that come within the category of privileges or immunities—preeminently the rights of personal security, contractual capacity, and property, along with access to the mechanisms of government that protect them. A state abridges such rights when it withdraws them from certain citizens, but not when it alters their content equally for all.

The following two formulations would therefore equivalently express the principle of general equality with respect to privileges and immunities of state citizenship: (1) every state shall give the same privileges and immunities to all its citizens; (2) no state shall abridge the privileges or immunities of any of its citizens. Both forbid Black Codes and imply Section 1 of the Civil Rights Act of 1866.<sup>148</sup> Neither strips a state of its power over the content of its citizens' rights. The Privileges or Immunities Clause thus reads as it does: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."<sup>149</sup>

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147. *Id.* at 157 app. Concerning the Black Codes, Representative Shellabarger rhetorically asked whether the national government could "prevent one race of free citizens from being by State laws deprived as a race of all the civil rights for the securement of which his Government was created, and which are the only considerations the Government renders him for the Federal allegiance which he renders?" *Id.* at 1293. The opponents, too, used this way of speaking about racially discriminatory laws. Representative Rogers, denouncing the 14th Amendment, was equally at ease in characterizing discriminatory legislation as a denial of rights: "If a Negro is refused the right to be a juror, that will take away from him his privileges and immunities as a citizen of the United States . . ." *Id.* at 2538.

148. For example, the Florida Black Code of 1865 had a special contract rule for "colored" farm laborers:

[I]f he shall refuse or neglect to perform the stipulations of his contract by willful disobedience of orders, wanton impudence, or disrespect to his employer or his authorized agent, failure or refusal to perform the work assigned to him, idleness, or abandonment of the premises or the employment of the party with whom the contract was made, he or she shall be liable, upon the complaint of his employer, or his agent, made under oath . . . to be arrested and tried before the criminal court of the county, and upon conviction shall be subject to all the pains and penalties prescribed for the punishment of vagrancy . . .

1865 Fla. Laws ch. 1. The statute abridged the common law right to contract, a basic privilege of citizens. The same can be said of Mississippi's provision "[t]hat every civil officer shall, and every person may arrest and carry back to his or her legal employer any freedman, free negro or mulatto, who shall have quit the service of his or her employer before the expiration of his or her term of service without good cause." 1865 Miss. Laws 84.

149. For the same reasons, Bingham's earlier draft, which authorized Congress to make all laws necessary and proper "to secure to the citizens of each State all privileges and immunities of citizens in the several States," CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866), would have conferred a congressional power to require equal citizens' rights. If a state denied someone the common law privileges of a citizen by unequal legislation, then overriding the legislation would secure those privileges. Under Bingham's

This seems to have been the understanding of the clause held by Representative Thomas Eliot, a Republican from Massachusetts, who paraphrased what is now the second sentence of Section 1 during the debates on the Fourteenth Amendment:

I support the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons with the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred.<sup>150</sup>

Note that Eliot rephrased the Privileges and Immunities clause, but evidently thought the other two clauses could speak for themselves.

A clear explanation was given by then-Senator Boutwell a few years after the Amendment passed.<sup>151</sup> To determine a citizen's rights under the clause, he said, we

see what the rights and privileges and immunities of citizens of the State generally are under the laws and constitution of the State. . . . The Government of the United States can take the humblest citizen in the State of Ohio who by the constitution or the laws of that State may be deprived of any right, privilege, or immunity that is conceded to the citizens of that State generally, and lift him to the dignity of equality as a citizen of that State . . . .<sup>152</sup>

Similarly, Representative Shellabarger said that the clause

[r]equires that the laws on their face shall not "abridge" the privileges or immunities of citizens. It secures equality toward all citizens on the face of the law. It provides that those rights shall not be "abridged;" in other words, that one man shall not have more rights upon the face of the laws than another man. By that provision equality of legislation, so far as it affects the rights of citizenship, is secured.<sup>153</sup>

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amendment, Congress would have had the power to secure state law rights by forbidding caste legislation.

150. *Id.* at 2511.

151. Boutwell was a determined radical from Massachusetts. He served as a Representative in the 39th, 40th, and 41st Congresses, as Grant's first Secretary of the Treasury, and then as a Senator. During the 39th Congress he served on the Joint Committee.

152. 3 CONG. REC. 1793 (1875).

153. CONG. GLOBE, 42d Cong., 1st Sess. 71 app. (1871) (debate on the Ku Klux Act). Shellabarger's remarks suggest that he may have thought that the citizenship clause of § 1 conferred substantive rights of national citizenship. He cited *Corfield* as listing the rights of national citizenship that Congress could protect against other private persons. This point was relevant because he was advocating provisions of the Ku Klux Act that punished purely private conduct. *Id.* at 69-70 app. He also stressed equality, however, and never suggested that the Privileges or Immunities Clause was anything other than an equality requirement.

Some Republicans adopted the equality-based reading with respect to rights of state citizenship. If this conclusion seems odd, it is probably because we no longer distinguish so easily between a state's power over the content of its citizens' rights and its power to determine which citizens shall have those rights. This change in perspective probably reflects an increase in legislative activity. In 1866, the privileges and immunities of citizenship were determined mainly by the common law and were fairly static. It was therefore easy to recognize a distinction between a change in the substantive law and an abridgment such as a Black Code. We are now used to legislation that rearranges people's private law relationships, and it seems strange to say that a change in the law of contract that restricts someone's rights does not abridge privileges or immunities.<sup>154</sup>

This reading offers a solution to the riddle of the text. The Privileges or Immunities Clause can be understood to mandate the rule of the Civil Rights Act of 1866.

#### 4. *Other Rights of United States Citizens*

The Civil Rights Act does not exhaust the meaning of the Privileges or Immunities Clause. The privileges and immunities of citizens of the United States include rights as defined by the positive law of their states; to abridge such rights is to take them away through unequal legislation. But citizens of the United States are citizens both of states and of the nation. Justice Miller was therefore correct in saying that the clause forbids the abridgment of rights created or protected by national law.

I will put aside the important question of whether this protection is completely redundant. It is certainly redundant with respect to those rights of national citizenship that were protected against the states before the Fourteenth Amendment was adopted, such as the right created by the Contracts Clause.<sup>155</sup> A more difficult question is whether there are privileges or immunities of United States citizenship that the states did not have to respect before the Amendment came into force but that became protected as a result of the Amendment. If such rights exist, then the clause has independent substantive

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154. As legislative changes in the underlying rules of property and contract multiplied in the later 19th century, the background, quasi-constitutional nature of the common law regime became problematic. One response was to constitutionalize the common law by forbidding legislation that interfered with vested property rights. Because all property was implicitly subject to the police power, courts began to inquire into whether legislation that interfered with property rights was an exercise of the police power, even though the Constitution never refers to the police power. This way of thinking was built into substantive due process doctrine. See generally BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (1942).

155. U.S.CONST. art. I, § 10. Even with respect to such rights, the 14th Amendment as a whole is not redundant because § 5 gives Congress an explicit power to enforce national rights, a power that it had not previously possessed.



effect, because those rights of national citizenship would no longer be subject to control by the states. As explained below, the most important issue turning on this question involves the application of the first eight Amendments to the states.<sup>156</sup>

### C. *The Civil Rights Act of 1875*

One of the reasons that Section 1 of the Fourteenth Amendment is so notoriously frustrating is that there is no contemporaneous written explanation that carefully goes through the text—especially the Privileges or Immunities Clause—clarifying its meaning and purposes. The history of the Civil Rights Act of 1875, however, contains substantial evidence to support my proposed reconstruction.<sup>157</sup> The Act banned race discrimination by common carriers, inns, and places of public amusement, and forbade race discrimination in jury selection by the states. The debates on the Act are a rich source of information about how the Fourteenth Amendment was understood at the time of its adoption, and they show that the equality theory of the Privileges or Immunities Clause was prominent among Republicans.

In examining those debates, it is necessary to understand that the Civil Rights Act of 1875 resembles the Civil Rights Act of 1866 far more than it resembles the Civil Rights Act of 1964, even though it applied mainly to private persons, and even though the Supreme Court is usually understood to have said that such an application was impermissible.<sup>158</sup> The crucial point, which is easy to miss, is that the private persons covered by the 1875 Act were those *already* under a duty to serve the public without discrimination. In principle, a common carrier was not permitted to turn away anyone who was well behaved and prepared to pay the proper fee.<sup>159</sup>

The 1875 Act was designed to deal with two problems. First, although the reconstructed Southern States had eliminated their Black Codes, many had not made it clear that the legal requirement of equal access to common carriers and other facilities would translate into actual integration, as opposed to what we now know as separate-but-equal accommodations. Second, many Republicans believed that the states were not enforcing the common law rule of nondiscrimination, but were instead permitting common carriers to violate it at the expense

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156. In order to avoid making unreasonable demands on the reader's patience, I shall not treat this fascinating question in any detail beyond my discussion of incorporation in Part V.C.5, *infra*.

157. Act of Mar. 1, 1875, ch. 114, 18 Stat. 335; see 7 FAIRMAN, *supra* note 9, at 156-84 (1987).

158. See *The Civil Rights Cases*, 109 U.S. 3 (1883).

159. The theory was set out by Senator Daniel Pratt, Republican of Indiana:

No one reading the Constitution can deny that every colored man is a citizen, and as such, so far as legislation may go, entitled to equal rights and privileges with white people. Can it be doubted that for a denial of any of the privileges or accommodations enumerated in the bill he could maintain a suit at common law against the inn-keeper, the public carrier, or proprietor or lessee of the theatre who withheld them?

2 CONG. REC. 4081 (1874).

of blacks. The Civil Rights Act of 1875 forbade any discrimination and gave victims a federal cause of action for damages.<sup>160</sup> Two leading constitutional questions thus became intertwined in the 1875 Act: one, which we can readily understand today, was whether separate-but-equal facilities were consistent with equal rights; the other was whether Congress possessed the power to act directly on private persons pursuant to Section 5 of the Fourteenth Amendment.

Our focus here, however, is not on those questions, but on the Republican theory that Congress' power to enact the 1875 Act derived from the Privileges or Immunities Clause. This thesis was put forth most clearly by Senator Matthew Hale Carpenter, Republican of Wisconsin, who after the departure of Reverdy Johnson was probably the preeminent lawyer in the Senate.<sup>161</sup> On February 1, 1872, Carpenter offered his own version of civil rights legislation. His proposal, which differed somewhat from the then-pending bill of Charles Sumner of Massachusetts, applied to inns, places of public amusement, common carriers, tax-supported cemeteries, benevolent institutions, and public schools. It did not apply to jury selection.<sup>162</sup>

Carpenter thought that his bill rested on the Privileges or Immunities Clause, and that the clause mandated equality without affecting the substance of rights. He began by contrasting the Privileges or Immunities Clause with the Comity Clause, which subjected a visiting American to all the abridgments of privileges or immunities imposed by a state on its own similarly situated citizens.<sup>163</sup> The Fourteenth Amendment, however, changed things:

If no State can make or enforce a law—and law in this connection includes State constitutions, common law, statutes, and usages in such State—to abridge the rights of any citizen it must follow that the privileges and immunities of all citizens must be the same. If my privileges are not equal to those of the Senator from Maine, then mine are abridged. This no State can do.<sup>164</sup>

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160. See *The Civil Rights Cases*, 109 U.S. at 9-10 (describing the Civil Rights Act of 1875).

161. Carpenter, for instance, represented the government in *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 511 (1869), and filed a brief for the monopoly butchers in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

162. Carpenter's substitute language would have imposed a fine on any public inn, licensed place of public amusement, common carrier, or on any publicly supported cemetery, benevolent institution, or school that made "any distinction as to admission or privileges therein against any citizen of the United States because of race, color, or previous condition of servitude." CONG. GLOBE, 42d Cong., 2d Sess. 760 (1872). He explained the differences:

It will be seen that I have included everything in this substitute which is embraced and intended to be provided for in the amendment offered by the Senator from Massachusetts, with the single exception of churches, which I think Congress has no power to regulate, and that I have changed the provision in regard to cemeteries, so as not to interfere with those which are merely incorporated, but only as to those which are supported at the public expense or by endowment for public use.

*Id.*

163. *Id.* at 762.

164. *Id.*

Carpenter thought that the Privileges or Immunities Clause banned race discrimination.<sup>165</sup> Senator Carpenter did not mean that race discrimination was prohibited as a side effect of giving everyone the same substantive rights. For if the privileges to which he referred were minimum absolute rights, rather than the particular legal rights established by some state, his inference would have been incorrect because it would have been possible for the rights of the Senator from Maine to have been enhanced beyond the minimum.

Carpenter's position on this issue was not left to inference. In defense of the provision that mandated equal access to common schools, he argued that he could never accept "that the children of one class of citizens shall not have the benefit of a common school supported at the public expense by general taxation."<sup>166</sup> Senator Allen Thurman, a Democrat from Ohio, interrupted to argue that this assumed Congress possessed the power to regulate public schools. Thurman evidently believed that the choice between integration and separate-but-equal facilities was a policy question left to the states by the Fourteenth Amendment, along with other substantive decisions concerning education.<sup>167</sup>

Carpenter took pains to disavow any substantive federal power over civil rights. He claimed only that equality required integration, ruling out the possibility that he believed the Privileges or Immunities Clause produced equality as a side effect of absolute rights.<sup>168</sup> Carpenter's theory was one of equality and equality alone, not substance.<sup>169</sup> He would not have suggested that using

165. Just after the quoted passage, Carpenter returned to the § 5 issue and argued that "if the State does not, by its legislation, put all citizens upon a common footing, Congress may do so." *Id.* Congress may thus demand equality.

166. *Id.* at 763. The common schools provision does not appear in the Civil Rights Act of 1875.

167. Thurman said: "[I]t is not a question at all whether colored children shall not have the benefit of common schools; but it is a question whether all power of regulation in the States is taken away from the States . . ." *Id.*

168. Carpenter said:

I want to know of the Senator from Ohio whether under this Constitution we cannot provide that no State shall exclude a colored man from the enjoyment of any right in a court of justice; for instance, to bring suit there or appear as a witness? Does that take away from the States the power to regulate their courts? Not at all; but it does say that in the one particular covered by the Constitution of the United States you shall dance conformity. Your power to regulate your own affairs, your schools, to say how many you shall have, how they shall be supported, and all that, is a power of your own; we cannot interfere with it; but if you have a school, and support it by taxation on all citizens, then you shall not discriminate between the children of different citizens. That does not take away all power to control them.

*Id.*

169. This is the same theory Carpenter employed in his brief on behalf of Myra Bradwell, who claimed that Illinois could not deny her admission to the bar because of her sex: "If no State may 'make or enforce any law' to abridge the privileges of a citizen, it must follow that the privileges of all citizens are the same." Brief for Plaintiff in Error at 6-7, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (No. 67). Carpenter began his attack on sex discrimination by explaining that limiting bar admission to white citizens would violate the Constitution because "[s]uch an act would abridge the rights of all colored citizens, by denying them admission into one of the avocations which this court has declared is alike open to every one." *Id.* at 10. Carpenter could see no difference between race and sex discrimination:

If the legislature may, under pretence of fixing qualifications, declare that no female citizen shall be permitted to practice law, they may as well declare that no colored citizen shall practice law

common schools (or public cemeteries) was a privilege or immunity in the substantive sense. If public schools were an absolute right then the states would be obliged to provide them. The decision whether to have public schools, however, was regarded as a question of policy for the states. The only issue was whether, given public schools, race discrimination would be allowed. During the debate on integrated schools, opponents often maintained that if integration were imposed, the Southern States would abandon public education. I have found no instance in which anyone replied that public education was a right the states could not take away.<sup>170</sup> Thus, proponents of civil rights legislation could not have premised their proposals entirely on a substantive view of the Privileges or Immunities Clause.

Other Republicans agreed that the proposed civil rights legislation rested on the Privileges or Immunities Clause. Senator John Sherman appeared to share this view.<sup>171</sup> Representative Benjamin Butler of Massachusetts, chairman of the House Judiciary Committee, almost certainly did as well. In December 1873, he introduced civil rights legislation essentially identical to Carpenter's.<sup>172</sup> Butler said that the Constitution forbade discrimination with respect to ordinary civil rights, such as those of riding on a railroad or attending a common school:

[T]he result of the late war has been that every person born on the soil, or duly naturalized, is a citizen of the United States, entitled to all the

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... [T]he *only* provision in the Constitution of the United States which secures to colored male citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life, is the provision that "No State shall make or enforce any law which shall abridge the privileges or immunities of a citizen."

*Id.* (emphasis added).

170. For example, Senator Henry Cooper, a Democrat from Tennessee, explained that in the South there had long been resistance to public schools supported by taxation. Cooper claimed that Tennessee would cease authorizing local governments to establish public schools if integration were required. 2 CONG. REC. 4155-57 (1874). A typical response to this argument (although not to Cooper specifically) was that of Senator Timothy Howe of Wisconsin. "I hear that threat, and I admit I am afraid . . . I do not know but the schools will fall if we do not stay our course; but when peril threatens of any kind I can meet it but in one way. Let justice be done though the common schools and the very heavens fall." *Id.* at 4151.

Senator Stewart opposed mandatory mixed schools in part because of the danger that it would cause the common schools in the South to shut down. In explaining this position, he noted that he had proposed a constitutional amendment requiring every state "to have an efficient system of common schools." *Id.* at 4167. "But while it is left to the States to have systems of free schools or not, and while the several States are wavering in the balance whether they will have those schools or not, I say it is endangering in many of the States the education of the present generation I fear." *Id.*

171. Sherman explained that the rights of American citizens were not limited to those granted by the federal Constitution, but embraced all the rights protected by the common law. After quoting the Privileges or Immunities Clause, Sherman asked: "What are those privileges or immunities? Are they only those defined in the Constitution, the rights secured by the amendments? Not at all. The great fountain head, the great reservoir of the rights of an American citizen is in the common law . . ." CONG. GLOBE, 42d Cong., 2d Sess. 843 (1872). Sherman must have had in mind antidiscrimination protection for those rights, unless he thought that the clause constitutionalized some version of the common law. His willingness to include public schools also makes it difficult to believe that he thought the clause gave substantive protection to state law rights.

172. 2 CONG. REC. 318 (1873).

rights, privileges, and immunities of a citizen. All legislation, therefore, that seeks to deprive a well-behaved citizen of the United States of any privilege or immunity to be enjoyed, and which he is entitled to enjoy in common with other citizens, is against constitutional enactment.<sup>173</sup>

Butler understood the Privileges or Immunities Clause as an antidiscrimination provision concerning common law rights.

Congress debated forerunners of the Civil Rights Act of 1875 through much of the early 1870's. On April 14, 1873, the Supreme Court decided an important case under the Privileges or Immunities Clause, the *Slaughter-House Cases*.<sup>174</sup> The reaction to that opinion by supporters and opponents of civil rights legislation is important evidence that people generally thought that this legislation rested on the Privileges or Immunities Clause. The legislators' thinking changed, however, when the *Slaughter-House* Court held that the clause protected only the rights of distinctively national citizenship, not ordinary common law rights.

Senator Sumner immediately submitted his civil rights bill when the Forty-third Congress convened on December 1, 1873.<sup>175</sup> The next day, he asked the Senate to take up the measure.<sup>176</sup> Orris Ferry, a Republican from Connecticut, who opposed the bill, moved that it be referred to committee.<sup>177</sup> Ferry argued that the *Slaughter-House* Court had held "in principle that the bill which the Senator has presented is a violation of the Constitution of the United States."<sup>178</sup> Sumner's motion failed.

When the House of Representatives turned to civil rights legislation the same month, opponents took up *Slaughter-House* as a chorus. Representative James Beck, a Kentucky Democrat, brought a copy and quoted the passage that distinguished between rights of state and national citizenship.<sup>179</sup> Because the rights to be protected by the proposed legislation were rights of state citizenship, Beck said, Congress could not reach them: the "whole spirit and bearing" of *Slaughter-House* was "against the constitutionality of the law now proposed."<sup>180</sup> When debate resumed in January, Virginia Democrat John Harris

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173. *Id.* at 340. Butler was talking about equality, not absolute entitlement. Although this would have been obvious from the inclusion of cemeteries and public schools, he made it explicit: "No State has a right to pass any law which inhibits the full enjoyment of all the rights she gives to her citizens by discriminating against any class of them provided they offend no law." *Id.*

174. 83 U.S. (16 Wall.) 36 (1873).

175. 2 CONG. REC. 2 (1873).

176. *Id.* at 10.

177. *Id.*

178. *Id.* at 11. Ferry said that the bill should be referred "because the constitutional question which was prominent in the former debate on this bill has been submitted to the consideration of the Supreme Court of the United States, and their decision promulgated since the Senate last met." *Id.* at 10.

179. *Id.* at 342.

180. *Id.* Beck believed that the rights of national citizenship included the protections of the first ten amendments. *Id.* at 342-43.

spoke first in opposition, declaring that the Court's decision made the bill unconstitutional.<sup>181</sup>

In response to *Slaughter-House*, some of the bill's proponents accepted the invitation to rely on the Equal Protection Clause—the argument that would seem obvious to us. Representative Robert Elliott, a Republican from South Carolina, argued that race-based denials of privileges or immunities of state citizenship violated equal protection.<sup>182</sup> Republican Representative William Lawrence of Ohio also turned to the Equal Protection Clause, but realized that this approach required some work with the language: “When it is said ‘no State shall deny to any person the equal protection’ of those laws, the word ‘protection’ must not be understood in any restricted sense, but must include every benefit to be derived from laws.”<sup>183</sup> Senator Frederick Frelinghuysen of New Jersey, another convert to equal protection, had a hard time shaking the notion that the bill was about the privileges and immunities of citizens. He argued that the privileges and immunities of distinctively national citizenship included the equal protection of the laws, which in turn amounted to general racial equality.<sup>184</sup>

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181. *Id.* at 376. Opposition speakers continued to cite and quote *Slaughter-House* throughout the debate. See, e.g., *id.* at 411 (Rep. Blount); *id.* at 415 (Rep. Bright); *id.* at 419 (Rep. Herndon). Actually, the case was useful for the bill's opponents only on a theory that was too subtle for most of them. Justice Miller recognized that the Reconstruction Amendments were designed to eliminate race discrimination. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71-72 (1873). To that extent, his opinion was consistent with the 1875 Act. The opinion casts doubt on the Act when it says that the regulation of civil rights remains with the states, implying that Congress may not act directly on private persons as the 1875 Act sought to do. *Id.* at 82. One Democrat who did understand was Alexander Stephens, then a Representative from Georgia. Stephens conceded that the Constitution, apparently through the Privileges or Immunities Clause, banned race discrimination. He said that the 14th Amendment was designed to make freed slaves citizens and to prohibit the States from denying them “the same privileges, immunities, and civil rights which were secured to the citizens of the several States, respectively, and of the United States, by the Constitution as it stood before citizenship to the colored race was declared by this amendment.” 2 CONG. REC. 379-80 (1874). He denied, however, that it went beyond equality and gave Congress power over private law:

Neither of these amendments [14th and 15th] confer, bestow, or even declare any rights at all to citizens of the United States, or to any class whatever. Upon the colored race they neither confer, bestow, or declare civil rights of any character—not even the right of franchise. They only forbid the States from discriminating in their laws against the colored race in the bestowment of such rights as they may severally deem best to bestow upon their own citizens.

*Id.* at 380. For Stephens, this meant that Congress could not grant a direct remedy for a private invasion of a state law right, but could act only on the states themselves.

182. *Id.* at 407-10.

183. *Id.* at 412. Lawrence went on to explain that the Civil War amendments were designed to uproot state race discrimination. *Id.* at 412-14. Representative Josiah Walls, a Republican from Florida, also argued that after *Slaughter-House*, the bill could still rest on the Equal Protection Clause, whatever the status of privileges and immunities. *Id.* at 416-17. He then dismissed *Slaughter-House*, observing that the nation's “onward march to a broader, higher, and brighter civilization” would not be halted by it any more than by that earlier case about citizenship, *Dred Scott*. *Id.* at 417.

184. *Id.* at 3453-54. Frelinghuysen seemed unsure whether he wanted to assert that the Equal Protection Clause was involved. At first, he seemed to be arguing that nondiscrimination was a free standing right of national citizenship. He then invoked the Equal Protection Clause. *Id.* Frelinghuysen conceded the force of *Slaughter-House*: “[A]s citizens of the United States we are all bound to respect that decision and not erect slaughter-houses in that district.” *Id.* at 3453. Frelinghuysen's initial suggestion resembles the argument put forward by Justice Harlan in dissent in the *Civil Rights Cases*, where he maintained that the grant of state citizenship contained in the first sentence of § 1 created a national right to “exemption from race

Other Republicans, living in the long shadow of *Dred Scott*, were prepared to defy the Court more directly. The boldest was George Boutwell of Massachusetts, then a Senator. His answer to *Slaughter-House* was that the Privileges or Immunities Clause mandated equality as to the rights of state citizenship, and that for all he cared the Supreme Court could go to hell. Boutwell "dismiss[ed] that case as a legislator."<sup>185</sup> He thought the Constitution protected rights of state citizenship.<sup>186</sup> For Boutwell, to say that the privileges and immunities of state citizenship were rights of American citizens was to say that the states must give all their citizens equal civil rights.<sup>187</sup>

The most thoughtful response came from Senator Timothy Howe, a Republican from Wisconsin. The purpose of the Reconstruction Amendments, he explained, was to put an end to every state's power "to deprive any one or any number of its citizens of the commonest rights of the commonest man."<sup>188</sup> Howe said that Justice Miller's opinion in *Slaughter-House* undertook "to assert a principle of constitutional law which I do not believe will ever be accepted by the profession or the people of the United States."<sup>189</sup> But Howe was mainly interested in severing the judgment concerning the Louisiana slaughterhouse

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discrimination in respect of any civil right belonging to citizens of the white race in the same State." 109 U.S. 3, 48 (1883). His theory may be returning to vogue. See, e.g., Robert D. Goldstein, Blyew: *Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 524-28 (1989).

185. 3 CONG. REC. 1792 (1875). Boutwell said that the decision was "the law of the case, but it is not law beyond the case," and "not law for the Senate when the Senate is engaged in considering a question which is a different question from that on which the court passed." *Id.* Perhaps Boutwell was not quite telling the Court to go to hell, but he was certainly denying that the opinions given in support of its judgments were the supreme law of the land.

186. In 1874, Boutwell said that Justice Miller's doctrine was a "great mistake":

As a citizen of the United States, the first right of the citizen of the State is that he shall enjoy all the privileges and immunities of a citizen of the State; and therefore as citizens of the United States, no State can make a distinction between the citizens of the State over which it has jurisdiction.

2 CONG. REC. 4116 (1874). The following year he said that "[t]he chief privilege, the great right established by the fourteenth amendment to the Constitution is that citizens of the United States are citizens of the State wherein they reside." 3 CONG. REC. 1793 (1875).

187. In 1874, Boutwell asked rhetorically whether the federal government could

secure to the citizen of every State all those privileges and immunities which belong to, or are enjoyed lawfully by, any other citizen of the same State by virtue of the fact that that citizen is, first, a citizen of the United States, and secondly, made a citizen of the State by virtue of the power of the General Government?

2 CONG. REC. 4116 (1874). In 1875 he said that:

while we cannot go into the States and say what the rights of citizens of the State in the State shall be, whenever there is a law in a State or a provision in its constitution which secures to citizens generally their rights and discriminates against other citizens, that discrimination is not only against citizens as citizens of the State, but against those citizens as citizens of the United States, and in our power under the fourteenth amendment to protect them as citizens of the United States, we . . . secure to our citizens, the citizens of the United States, their rights under the laws of the States as citizens of the State.

3 CONG. REC. 1793 (1875).

188. 2 CONG. REC. 4147 (1874).

189. *Id.* at 4148.

monopoly from the reasoning that had produced it.<sup>190</sup> He pointed out that even if the decision succeeded in gutting the Privileges or Immunities Clause, it still had nothing to do with the pending civil rights bill, because Justice Miller had agreed that the Equal Protection Clause forbade race discrimination.<sup>191</sup> Howe apparently thought the Privileges or Immunities Clause to be primarily an antidiscrimination provision and hoped that *Slaughter-House* might be recast to accept that principle. In the interim, he seemed willing to rely on the Equal Protection Clause.

Parting company with the challengers of the *Slaughter-House* decision was Matthew Carpenter, who decided not to fight the Supreme Court. By 1875 he thought that the public accommodations and schools provisions were unconstitutional under *Slaughter-House*, and he persisted in his longstanding objection to the jury provision.<sup>192</sup> Even though he still supported the bill's aims, Carpenter would not participate in what he deemed the counterproductive enterprise of passing a statute that would be invalidated by the courts.<sup>193</sup> Although he agreed that *Slaughter-House* might have been incorrectly decided, he said that it would nonetheless apply to civil rights legislation.<sup>194</sup> To pass the bill under those circumstances, he argued, would be a cruel hoax that would disserve the cause of freedom.<sup>195</sup>

To summarize, the theory of the Fourteenth Amendment that I present here was current in the early 1870's. Many leading Republicans believed that Congress' power to pass civil rights legislation derived from the Privileges or Immunities Clause. Senator Carpenter, one of the nation's preeminent lawyers, explained the clause explicitly in terms of equal citizens' rights. The opponents of the 1875 Act also understood the Privileges or Immunities Clause to be the proffered constitutional warrant for the legislation. Thus, when the Court in *Slaughter-House* held that the clause had nothing to do with rights of state citizenship, those opponents put this case at the center of their argument. Before *Slaughter-House* was decided, and even for a short while thereafter, Republi-

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190. Howe was trying to separate monopolies from race discrimination. He said the monopoly act "made no discrimination between a white man and a black man. It made, I think, broad discrimination between the rights of white men—a discrimination which upon my soul I believe the fourteenth amendment condemns—but not a syllable of discrimination between the two colors." *Id.* Howe disliked Justice Miller's distinction between state and national rights, which he said was "not the conclusion of the court" but merely "a part of the argument simply by which the justice who delivered the opinion of the majority undertook to defend the judgment of the court." *Id.* According to Howe,

if it were the judgment of the court and could be found to-day inscribed on its records, I could not forbear to say, what the American people and I believe the civilized world have already said of another and a prior decision of that same court, that it is not law and cannot be law.

*Id.*

191. *Id.* at 4148-49.

192. 3 CONG. REC. 1861-64 (1875).

193. *Id.* at 1861.

194. *Id.* at 1863.

195. *Id.*



cans in Congress thought that the Privileges or Immunities Clause mandated equality with respect to the rights of state citizenship.

#### IV. EQUALITY, PROTECTION, AND THE EQUAL PROTECTION CLAUSE

The foregoing approach to the Privileges or Immunities Clause has been guided by an attempt to determine how the clause could be the ground for the Civil Rights Act of 1866.<sup>196</sup> The natural response to this approach is to say that the attempt is unnecessary and any equality-based reading of the clause is redundant because the Equal Protection Clause provides the necessary ground and more. According to the orthodox view, the Equal Protection Clause mandates equality in all state actions.<sup>197</sup>

This venerable position, which may have been taken by some participants in the framing debates, is often attributed to the Supreme Court's first great Equal Protection Clause case, *Strauder v. West Virginia*.<sup>198</sup> It is, however, unpersuasive when examined closely. On the contrary, it is more plausible to conclude that the Equal Protection Clause requires equality with respect to the "protection of the laws," a subset of the activities of government and, crucially, of the privileges and immunities of citizens. In short, the Equal Protection Clause is mainly about protection, even though it is about equality too.

In this part of the Article, I will first try to shake our traditional understanding of the Equal Protection Clause and then sketch the rudiments of a reading that is more in keeping with the provision's text and history.

##### A. *Equality In Everything or Equality in Protection*

###### 1. *The Text*

The challenge to orthodoxy begins with the language of the clause.<sup>199</sup> "No

196. I do not mean to suggest that my reading cannot stand on its own. On the contrary, it has the significant virtue of accounting for the rights of both of the citizenships conferred by the first sentence of § 1 and of using the concept of state-citizenship privileges and immunities that appears in the orthodox reading of the Comity Clause. My reading, however, becomes not merely attractive but imperative if the Civil Rights Act must rest on the Privileges or Immunities Clause.

197. "A core purpose of the Fourteenth Amendment was to do away with governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (footnote omitted) (resting on Equal Protection Clause); see also 2 RONALD D. ROTUNDA ET AL., *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 314 (1986) (Equal Protection Clause "governs all governmental actions which classify individuals for different benefits or burdens under the law").

198. 100 U.S. 303 (1880). The Court cited *Strauder* as authority for its sweeping statement in *Palmore v. Sidoti*, 466 U.S. at 432.

199. Although this view of the clause may seem unfamiliar, many students of the original understanding agree that the clause is about protection in a limited sense. Jacobus tenBroek, who systematically surveyed the origins of the 14th Amendment in the abolitionist movement, concluded that the clause was a substantive mandate for "[p]rotection of men in their fundamental or natural rights," and that "equality was a modifying condition." TENBROEK, *supra* note 49, at 237. Earl Maltz argues that the Equal Protection Clause was

State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Those words require equality with respect to something, and our ordinary understanding of the Equal Protection Clause is that they require equality with respect to everything. This may seem obvious, but it is not. If the Constitution contained a provision forbidding any state from denying to anyone the equal right to trial by jury, no one would think that it applied to anything other than jury trials.<sup>200</sup> But the orthodox view holds that the clause does not refer to any right in particular, but to all rights. The standard reading, then, rests on the premise that the "protection of the laws" means the same thing as, for example, "treatment under the law" or simply "laws."

That last statement makes the point rather strikingly: the word protection is not doing much work in the standard reading of the text. Nothing is gained by going from "equal laws" to "the equal protection of the laws." If orthodoxy is correct, the noun in the Equal Protection Clause is, at best, surplusage. I say at best, because the word actually obscures the universal sweep of the text that the standard reading demands. The word protection, if taken in its ordinary sense, has meanings that make it difficult for the clause to apply to everything a state does. For one, the protection of the laws can refer to an operation or activity of the laws, which suggests that the Equal Protection Clause governs the administration or execution of the laws rather than their content. But if protection refers only to application and not to substance, the clause is not all encompassing and could not generate the Civil Rights Act of 1866.

The language could, however, be looser—"protection" might signal that the clause refers to laws that have to do with protecting something. If that is what is going on, the clause once again cannot require equality in everything, because by hypothesis it does not govern laws that do not have to do with protection, whatever protection might be about. The standard reading of the clause is persuasive only as long as we stress the adjective while ignoring the noun. It rests on a belief that there is no distinctive "protection of the laws" separate from "the laws." If that belief is not correct, then, parallel to the right to jury trial in the example above, the clause must have a nonuniversal content, limited to the protection of the laws, however that may be understood.

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designed to "constitutionalize a principle which would require statutes to provide the mechanism to protect citizens in the exercise of extrinsically established legal rights." Earl A. Maltz, *The Concept of Equal Protection of the Laws—An Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 537 (1985). Alfred Avins reached the same conclusion about the limited meaning of protection after a careful review of the use of the concept in the Reconstruction debates. Alfred Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y.L. F. 385 (1966); see also CURRIE, *supra* note †, at 348-50; HERMIONE H. MEYER, *THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT* 150-51 (1977).

200. We easily could have had such a provision. James Madison's initial draft of the religion clauses of the First Amendment provided that "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext, infringed." 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1834) (June 8, 1789).

## 2. *Protection By Government*

In fact, usage in the nineteenth century and during Reconstruction recognized something called the protection of the laws, which was a central function of government, but did not include everything that the government did. Specifically, "protection of the laws" referred to the mechanisms through which the government secured individuals and their rights against invasion by others.

That the basic function of government was to protect people's rights was a commonplace.<sup>201</sup> The Lockean bargain, by which the citizens give the government a promise of obedience—allegiance—and receive security for their rights in return, was explained by Blackstone, who said that the "original contract of society" was

that the whole should protect all of it's [sic] parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any.<sup>202</sup>

In America, this basic purpose of the state made it on to Justice Washington's *Corfield* list, which included "[p]rotection by the government" among the privileges and immunities of citizens.<sup>203</sup> During the debate on the Civil Rights Act of 1866, Representative James Wilson of Iowa, chairman of the House Judiciary Committee, invoked the connection between allegiance and protection.<sup>204</sup> Wilson's remarks made clear that the remedies government provides when citizens' rights are invaded are essential to government's protective function.<sup>205</sup>

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201. Earl Maltz discusses this in considerable detail. Maltz, *supra* note 199, at 507-10.

202. 1 WILLIAM BLACKSTONE, COMMENTARIES \*47-48. I call the bargain Lockean, but could as easily have said Hobbist. "The Obligation of Subjects to the Sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them. . . . The end of Obedience is Protection . . . ." THOMAS HOBBS, LEVIATHAN 272 (C.B. McPherson ed., Penguin Books 1968).

203. 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

204. "The highest obligation which the Government owes to the citizen in return for the allegiance exacted of him is to secure him in the protection of his rights." CONG. GLOBE, 39th Cong., 1st Sess. 1295 (1866).

205. Wilson spoke in response to a proposal of Bingham's, who had moved an amendment to a then-pending motion to recommit the civil rights bill to committee. Bingham's amendment would have instructed the Judiciary Committee to replace the criminal penalties of the bill with a private cause of action by the victim of discrimination. *Id.* at 1291. Wilson responded that Bingham's provision would protect only those who could afford a lawsuit:

This bill proposes that the humblest citizen shall have full and ample protection at the cost of the Government, whose duty it is to protect him. The amendment of the gentleman recognizes the principle involved, but it says that the citizen despoiled of his rights, instead of being properly protected by the Government, must press his own way through the courts and pay the bills attendant thereon. This may do for the rich, but to the poor, who need protection, it is mockery . . . . Sir, I cannot see the justice of that doctrine and I assert that it is the duty of the Government of the United States to provide proper protection, and to pay the costs attendant

The remedial function of government sometimes went by the name of the protection of the laws. The phrase appears in Blackstone, who characterized "[t]he remedial part of the law" as "the protection of the law."<sup>206</sup> The words made their way to America at least by 1803, when Chief Justice Marshall explained that someone possessing a right to his commission had a remedy at law because "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."<sup>207</sup> Marshall's successor, Chief Justice Taney, quoted Blackstone's definition of the protection of the laws as their remedial operation in an 1843 opinion involving the Contracts Clause.<sup>208</sup>

### 3. Reconstruction

#### a. Protection

The Equal Protection Clause grew out of proposals in the Thirty-ninth Congress that dealt with this concept of the protection of the laws. On January 20, 1866, the Joint Committee considered a subcommittee proposal for a constitutional amendment that would give Congress power "to secure . . . to all persons in every State equal protection in the enjoyment of life, liberty, and property."<sup>209</sup> A few days later the same subcommittee prepared a draft providing that Congress would have power "to secure all persons in every State full protection in the enjoyment of life, liberty, and property; and to all citizens of

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on it.

*Id.* at 1295.

206.

The *remedial* part of the law is so necessary a consequence of the former two [declaratory and directory], that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law.

1 BLACKSTONE, *supra* note 202, at \*55-56.

207. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

208. *Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 317 (1843). Taney, writing for the Court, held that the Contracts Clause prevented Illinois from retrospectively limiting the foreclosure rights of judgment creditors or granting the mortgagor a new right to redeem. He reasoned that the Contracts Clause, which forbids the states from impairing the obligation of contracts, U.S. CONST. art. I, § 10, included both the right created by the contract and those aspects of the remedy interference with which would materially impair the right. In the process, Taney equated remedy and protection:

We have quoted the entire paragraph [from Blackstone], because it shows, in a few plain words, and illustrates by a familiar example, the connection of the remedy with the right. It is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the Constitution now in question mainly intended to secure.

42 U.S. (1 How.) at 317-18.

209. JOINT COMMITTEE JOURNAL, *supra* note 82, at 12. The same proposal would have given Congress power to secure "to all citizens of the United States, in every State, the same political rights and privileges." *Id.* Apparently the protection provision was not thought to include political rights.

the United States, in any State, the same immunities and also equal political rights and privileges.”<sup>210</sup> Similarly, Bingham’s February draft, which was the immediate precursor to the second sentence of Section 1, empowered Congress “to secure . . . to all persons in the several States equal protection in the rights of life, liberty, and property.”<sup>211</sup> These drafts dealt with the distinctively protective function of government; they evidently did not refer to all government activities.<sup>212</sup>

The notion that the Equal Protection Clause governs a right to protection was expressed clearly in the debates on the Ku Klux Act of 1871.<sup>213</sup> The claim that Congress had power to act directly against private outrages like those of the Klan usually rested not on the theory that the Equal Protection Clause forbade discrimination in general, but on a belief that it specifically forbade discrimination in law enforcement—the protection of the laws. The idea was that if the states failed in their duty to provide equal protection, then Congress’ enforcement power extended to undertaking the duty itself.<sup>214</sup> In discussing the Ku Klux Act, many Republicans focused on the states’ duty to protect life, liberty, and property.<sup>215</sup>

210. *Id.* at 14–15.

211. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

212. This concern with protection is exhibited by the Civil Rights Act itself, which gave all citizens “full and equal benefit of all laws and proceedings for the security of person and property.” Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

213. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. The Ku Klux Act was the third of the four major Reconstruction civil rights laws. The first was the Civil Rights Act of 1866. Next came the Voting Rights Act of 1870. Act of May 31, 1870, ch. 114, 16 Stat. 140. Its primary purpose was to enforce the 15th Amendment, although it had other important provisions too. The Ku Klux Act was directed at private violence against freed slaves and Republicans and at state officials who failed to deal with such violence. Last was the Civil Rights Act of 1875, Act of Mar. 1, 1875, ch. 114, 18 Stat. 335. It forbade race discrimination by common carriers and other private persons who were under a duty to serve the public, and forbade race discrimination in jury selection.

214. Senator Daniel Pratt, a Republican from Indiana, said to states that objected to federal punishment of “riots, arsons, robberies, and murders”: “You have brought this necessity upon yourselves by refusing to obey a plain constitutional duty not to withhold from any one the equal protection of your laws.” CONG. GLOBE, 42d Cong., 1st Sess. 506 (1871). This argument has two steps: (1) the Equal Protection Clause obliges the states equally to protect people’s rights against other private persons, and (2) where the state has failed in its obligation, Congress can enforce that obligation by creating a substitute federal remedy. One can agree with the first proposition without agreeing with the second. Both, however, reflect the focus on protection.

215. Republican Representative George Hoar of Massachusetts said that Congress was flooded with complaints “that large numbers of our fellow-citizens are deprived of the enjoyment of the fundamental rights of citizens. That their lives are not secure; that their property does not receive the equal protection of the law; that their homes are not safe . . .” *Id.* at 332. Hoar apparently thought that equality in the content of the laws was required by the Privileges or Immunities Clause, while the Equal Protection Clause was concerned with legal remedies and administration. He said that if the 14th Amendment was designed merely to prevent “formal exercise of power by the State in derogation of civil rights, that last clause would have been unnecessary, because the preceding part had provided that ‘no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.’” *Id.* Similarly, Representative Samuel Shellabarger said that “[t]he laws must be, first, equal, in not abridging rights; and second, the States shall equally protect, under equal laws, all persons in them.” *Id.* at 71 app.

b. *Suffrage*

All this shows that during Reconstruction the interpretation of the Equal Protection Clause that is today accepted had a competitor which limited the clause to the protective functions of government. In order to determine which of these readings would have seemed more natural when the Amendment was framed, we can examine one of the crucial issues of Reconstruction: equal suffrage. Suffrage is especially illuminating because, as has long been recognized, the debates on voting rights cast doubt on the claim that the Equal Protection Clause is universal in scope. Those debates leave us with the nagging question of how so many Republicans could have asserted that Section 1 of the Fourteenth Amendment had nothing to do with voting when they had before them a clause that so obviously applied to all government actions.<sup>216</sup> Such claims would be understandable, however, if those Republicans thought they had before them two relevant clauses, *both* of which were limited in subject matter: one to the privileges and immunities of citizens, the other to the protection of the laws.

We can begin with the source. John Bingham said, "The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States."<sup>217</sup> This confirms that as far as Bingham was concerned the drafting change from protection of life, liberty, and property to protection of the laws did not expand the Equal Protection Clause to include all government actions.<sup>218</sup> Jacob Howard was just as emphatic, in 1866 and later, in asserting that Section 1 had nothing to do with voting. When he

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216. The second Justice Harlan assembled the best known compilation of the evidence concerning voting. He claimed that the 14th Amendment does not affect the right to vote other than through § 2. *See Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part); *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting). Although Justice Harlan apparently recognized that the Privileges or Immunities Clause constitutionalizes the Civil Rights Act of 1866, 400 U.S. at 163, his account of the Equal Protection Clause went no further than to cast doubt on its application to voting. *Id.* at 164. Perhaps because he was unwilling directly to challenge the presumption that the Constitution contains a general ban on state race discrimination, he rested his argument mainly on inferences from § 2 of the Amendment, and did not seek to give a detailed account of the language of § 1 that would be consistent with his conclusion. The more limited reading of the Equal Protection Clause represents the textual grounding of his claim about voting rights that Justice Harlan either did not have, or did not think he could use.

217. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866). Bingham believed that other parts of the Constitution—specifically, the Article I, § 2 requirement that Representatives be elected by the people, and the Guarantee Clause—limited the states' power to disenfranchise large numbers of their adult male citizens. *Id.* But he evidently did not believe that the 14th Amendment imposed any new limitations. In 1871, Bingham presented a report of the House Judiciary Committee on a petition urging that Congress secure the franchise for women under the Privileges or Immunities Clause. The report responded that the 14th Amendment "did not add to the privileges or immunities" contained in Article IV, and that its guarantees thus did not include voting. H.R. REP. NO. 22, 41st Cong., 3d Sess. 1-3 (1871).

218. It is clear that Bingham thought that § 1 did not affect suffrage. He thus apparently did not subscribe to the current reading of the Equal Protection Clause. It is more difficult to determine whether he would have shared my belief that the clause, albeit not universal, is not even broad enough to support the entire Civil Rights Act of 1866. I think he probably would have done so, because he recognized the difference between the rights of citizens and aliens, *infra* note 237, but some doubt remains on that question.

introduced the Fourteenth Amendment in the Senate, he said, "The first section of the proposed amendment does not give to either of these classes [blacks or whites] the right of voting."<sup>219</sup> A few years later, Howard was shocked by the suggestion that race discrimination with respect to voting violated Section 1 of the Fourteenth Amendment.<sup>220</sup> If Howard thought that the protection of the laws included all the laws, his treatment of suffrage is impossible to explain.<sup>221</sup>

Similarly, during the debates on the Civil Rights Act, Senator Henry Wilson, a Republican from Massachusetts, articulated his view that the government's obligation to provide full protection of life, liberty, and property did not imply equal suffrage.<sup>222</sup> Later in 1866, toward the end of the debate on the Fourteenth Amendment, Vermont Republican Senator Luke Poland likewise said that equal protection did not imply equal voting rights.<sup>223</sup>

219. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). Howard was candid that he felt this was a shortcoming of the amendment required by political reality. *Id.*

220. "I feel constrained to say here now that this is the first time it ever occurred to me that the right to vote was to be derived from the fourteenth article. I think such a construction cannot be maintained." CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869). A moment later Howard explained that the Privileges or Immunities Clause did not include the franchise because the similar language in Article IV did not do so. *Id.* He then went on to explain that the Privileges or Immunities Clause was designed to eliminate the Black Codes; after quoting the clause, he said:

The immediate object of this was to prohibit for the future all hostile legislation on the part of the recently rebel States in reference to the colored citizens of the United States . . . It was to secure them against any infringement or violation of their rights by those southern Legislatures.

That is the whole history of it.

*Id.* It is not clear whether Howard thought the clause accomplished this end through a substantive or an equality-based rule.

221. Howard's 1866 discussion of the Equal Protection Clause provides support for both views of the clause's meaning. Howard began by saying that the clause (perhaps along with the Due Process Clause, which he had just quoted) "abolishes all class legislation in the States." CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). Shortly thereafter, he spoke of giving "the black man, I had almost called it, the poor privilege of the equal protection of the law." *Id.* The latter statement sounds like it refers to protection as one right among others.

222. Wilson explained that in his view the 13th Amendment enabled Congress to require equal protection for the freed slaves but did not empower it to affect the suffrage:

When [the 13th] amendment was added to the Constitution it gave Congress ample power to make these men free, as free as the non-voting white population of those States, as the women or children, or such persons as were not allowed the privilege of suffrage. The Massachusetts bill of rights declares that "each individual in society has a right to be protected by it in the enjoyment of his life, liberty, and property." Mr. Webster says that "the right of being protected in life, liberty, and estate is due to all, and cannot be justly denied to any, whatever be their age, property, or residence in the State." This sacred right to be fully protected in life, liberty, and estate is due to the freedmen, and I believe Congress is clothed with ample authority to secure the emancipated slaves in their civil rights and immunities. But I did not understand then, and I do not believe now, that it gives Congress the power to clothe these men with suffrage or to confer office upon them.

*Id.* at 1255.

223. Shortly after quoting the last two clauses of § 1, Poland said:

All the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government. Notwithstanding this no State or community professing to be republican allows all its people to vote.

*Id.* at 2962. Although he did not believe that the Equal Protection Clause applied to all state activities, apparently because he thought of protection as a specific right, Senator Poland probably would not have

One especially instructive passage in the Reconstruction debates appears during the preparation of the Fifteenth Amendment. In 1869, Representative George Boutwell, arch-radical, member of the Joint Committee, and exponent of an equality reading of the Privileges or Immunities Clause, introduced in the House both a constitutional amendment that was a forerunner of the Fifteenth Amendment and a bill to accomplish the same end by ordinary legislation. In support of the bill he relied on several sources of congressional authority, including the Privileges or Immunities Clause but not the Equal Protection Clause.<sup>224</sup> Boutwell, who was not shy about asserting federal power, seems to have thought it plausible that voting was a privilege of citizens but not that it was part of the protection of the laws.<sup>225</sup> Both his approach to voting legislation and the repeated statements by other Republicans that Section 1 had nothing to do with voting, are consistent with the view that the Equal Protection Clause is limited to the protection of the laws. They are not consistent with the current view.

### c. *The Broader Reading*

This suggests that the more limited interpretation was not only present but widespread among Republicans. It is more difficult to determine when the now-accepted view, according to which the clause secures equality with respect to

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shared my belief that the clause was not even broad enough to encompass the entire Civil Rights Act of 1866. He strongly implied that in his view the 1866 Act rested on the Equal Protection Clause, and possibly the Due Process Clause. *Id.* at 2961.

224. CONG. GLOBE, 40th Cong., 3d Sess. 555-61 (1869). Boutwell appealed to Congress' power to determine the manner of electing representatives under Article I, § 4, *id.* at 556-57, and to the Guarantee Clause, *id.* at 557-58, as well as the Privileges or Immunities Clause, which he discussed at length, *id.* at 558-59. Boutwell's bill was entitled, "A bill to secure equal privileges and immunities to citizens of the United States, and to enforce the provisions of article fourteen of the amendments to the Constitution." *Id.* at 561. As demonstrated below, one reason he did not mention the Equal Protection Clause was probably to avoid the response that aliens would then have the right to vote guaranteed by the Constitution. Boutwell was not alone in this tendency. In 1868, Thaddeus Stevens argued that Congress could require equal suffrage under the 14th Amendment. Although he never identified a specific clause as the source of this power, he spoke repeatedly of the rights, privileges, and immunities of citizens, but never of the protection of the laws. CONG. GLOBE, 40th Cong., 2d Sess. 1966-68 (1868).

225. Justice Harlan's historical analysis in *Oregon v. Mitchell* drew a response from Justices Brennan, White, and Marshall. 400 U.S. 112, 250-78 (1970) (concurring in part and dissenting in part). All of their historical evidence that specifically relates a clause of the 14th Amendment to suffrage concerned the Privileges or Immunities Clause. For example, they argued that Bingham's first proposed amendment might have covered suffrage, even though it did not mention voting, because it was a successor to an earlier draft that did cover political rights. *Id.* at 258-60. The equal protection provision of Bingham's proposal, however, was limited to life, liberty, and property, *id.* at 259; only the privileges and immunities language even arguably could have included suffrage. Similarly, the Justices presented evidence that they said suggested that Bingham, *id.* at 264-66, Howard, *id.* at 263-66, and Democrat Andrew Jackson Rogers, *id.* at 267, thought that the privileges of citizens included the franchise. William Van Alstyne's response to Justice Harlan's earlier opinions also suggests that the Equal Protection Clause applies to suffrage without either presenting any historical source saying precisely that or considering the possibility that the clause, rather than being universal, is limited to the protection of the laws. William Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.



all state activities, made its first appearance. As a comparison of Howard's reference to abolishing all class legislation with his emphatic pronouncements about voting demonstrate, discussions of the clause that seem to confirm our understanding may in fact not do so. Statements in the congressional debates that come to grips with this issue and come down in favor of a broad reading appear late in Reconstruction.<sup>226</sup>

Those statements seem to find it necessary to wrestle with the text. For example, during the drafting of what became the Civil Rights Act of 1875, Senator Carpenter proposed legislation that forbade discrimination by common carriers but, unlike Sumner's draft, did not deal with jury service. Carpenter's view was that jury service was a political right, not a civil right, and therefore was not a privilege or immunity of citizens.<sup>227</sup> In response, Senator Oliver Morton of Indiana sought to rely on the Equal Protection Clause. In order to do so, he found himself explaining that equal protection was not limited to protection as ordinarily understood, but that it should be understood more broadly to include the equal "benefit" of the laws.<sup>228</sup>

On balance, and especially in light of the evidence concerning suffrage, it seems likely that the dominant view, at least in 1866, was that the protection of the laws was not the same thing as "the laws."

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226. Avins asserted that the now-orthodox reading did not appear at all until the 1870's:

It was not until the Republican majority was, under political pressure, forced to find a way of justifying the constitutionality of the Civil Rights Act of 1875, that, for the first time, the theory was developed and expounded that the word "protection" in the Equal Protection Clause meant "benefit," and that this clause conferred anything more than the same remedies for pre-existing rights.

Avins, *supra* note 199, at 424 (citations omitted).

227. Alluding to the Civil Rights Act of 1866, Carpenter said: "The right to testify in court is undoubtedly one of those inherent privileges that belong to a citizen which the State cannot impair; but that is different from the political right to serve as a juror or judge; at least it seems so to me." CONG. GLOBE, 42d Cong., 2d Sess. 821 (1872). He distinguished privileges or immunities from political rights again the next day. *Id.* at 843.

228. Morton asked:

[W]hat is meant by "the equal protection of the laws" which a State shall not deprive any person of? To what does the word "protection" refer? Does it mean that the State shall not deprive a man of the equal protection of the law for his person? Will any one contend that it shall have a construction so narrow as that? Will it be contended that it means that a State shall not deprive a person of the equal protection of the laws for his property; that it shall be confined to that? I submit that when it declares that no State shall deprive any person of the equal protection of the laws, it means substantially that no person shall be deprived by a State of the equal benefit of all the laws; that the word "protection," as there used, means not simply the protection of the person from violence, the protection of his property from destruction, but it is substantially in the sense of the equal benefit of the law . . . .

*Id.* at 846-47. In 1875 he was still struggling with the word protection, quoting the clause and asking: "Does that simply mean that each man shall be equally protected or have an equal right to be protected from an assault and battery, from assassination? Is it confined to that? Not at all." 3 CONG. REC. S1793 (1875). The same problem confronted those Republicans who, after *Slaughter-House*, sought to rest the Civil Rights Act of 1875 on the Equal Protection Clause. See *supra* notes 182-84 and accompanying text.

#### d. *Citizens and Aliens*

The contention that the Equal Protection Clause refers only to the protection of the laws raises the question whether the protection of the laws includes everything in the Civil Rights Act of 1866. In fact, discussion and congressional action during Reconstruction support not only the claim that the clause is limited to protection, but the thesis that while the privileges and immunities of citizens are broad enough to encompass the 1866 Act, the protection of the laws is not. This evidence revolves around the nineteenth-century approach to the respective rights of citizens and aliens.

A striking feature of the second sentence of Section 1 is that the first clause refers to citizens while the latter two refer to persons. It was clear in the nineteenth century that citizens had rights that aliens, who were persons but not citizens, did not.<sup>229</sup> Most importantly, aliens generally were not permitted to own real property except as specifically provided by state law.<sup>230</sup> Indeed, the classic way of explaining the operation of the Comity Clause was to say that it would relieve visiting Americans of the disabilities of aliens and thus allow them to own real estate.<sup>231</sup> This commonplace about the rights of citizens and aliens arose during the debates on the Civil Rights Act. The word "inhabitants," which had appeared in the original draft of Section 1, was changed to "citizens" in order to avoid any implication that it would enable aliens to own real property.<sup>232</sup>

To say that aliens were not citizens, and in particular that they could not hold real estate, was not to say that aliens were to be treated as outlaws. On the contrary, civilized countries extended to aliens the protection of the laws. Blackstone noted that the King of England protected aliens while they were within the realm, although he protected his natural-born subjects everywhere and at all times.<sup>233</sup> Like other ideas of Blackstone's, this one crossed the

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229. Republican Representative Horatio Burchard of Illinois said during the debates on the Ku Klux Act: "The privileges and immunities of a citizen of the United States are those particular advantages or exemptions secured or granted to them, but not extended to all persons, and from which aliens may lawfully be debarred." CONG. GLOBE, 42d Cong., 1st Sess. 313-14 app. (1871).

230. Chancellor Kent discussed the disabilities of aliens with respect to real property in some detail in his *Commentaries*. 2 KENT, *supra* note 50, at 15-38. The doctrine comes from the common law. 1 BLACKSTONE, *supra* note 202, at \*360-61.

231. This was Story's account of the Comity Clause's purpose: "It is obvious, that, if the citizens of each state were to be deemed aliens to each other, they could not take, or hold, real estate or other privileges, except as other aliens." STORY, *supra* note 50, at 674. The Supreme Judicial Court of Massachusetts explained that the states of the Union remained foreign to one another for certain purposes, even though under the Comity Clause out-of-staters "shall not be deemed aliens, but may take and hold real estate." *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89, 92 (1828).

232. CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (Sen. Johnson).

233.

As therefore the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien, only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire.

Atlantic. In a speech against the Fourteenth Amendment, Senator Edgar Cowan, a moderate Republican from Pennsylvania, objected to Section 1's grant of citizenship, because of the rights that might come with citizenship. He knew on the one hand that strangers did have the right to protection:

If a traveler comes here from Ethiopia, from Australia, or from Great Britain, he is entitled, to a certain extent, to the protection of the laws. You cannot murder him with impunity. It is murder to kill him, the same as it is to kill another man. You cannot commit an assault on him, I apprehend. He has a right to the protection of the laws . . . .<sup>234</sup>

On the other hand, it was equally clear to Senator Cowan that aliens were not full citizens and that their rights to hold real property were limited:

I have supposed that every human being within [the courts'] jurisdiction was in one sense of the word a citizen, that is, a person entitled to protection; but in so far as the right to hold property, particularly the right to acquire title to real estate, was concerned, that was a subject entirely within the control of the States. It has been so considered in the State of Pennsylvania; and aliens and others who acknowledge no allegiance, either to the State or to the General Government, may be limited and circumscribed in that particular.<sup>235</sup>

Senator Cowan went on to argue that it was unwise to take away from the states the power to determine who should enjoy the rights of citizens.<sup>236</sup> John Bingham, too, distinguished between the right to protection, to which citizen and stranger alike were entitled, and the exclusive rights of citizens.<sup>237</sup>

Senator Cowan put the point neatly, but the most striking evidence that many Republicans believed that the limited rights of aliens included the protec-

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1 BLACKSTONE, *supra* note 202, at \*358.

234. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

235. *Id.*

236. Senator Cowan had a novel objection to the 14th Amendment. Pennsylvania had been invaded, he complained, by Gypsies, and he did not want Congress to interfere with Pennsylvania's measures to protect itself from this invasion. *Id.* at 2891. Senator John Conness of California responded:

The only invasion of Pennsylvania within my recollection was an invasion very much worse and more disastrous to the State, and more to be feared, and more feared, than that of Gypsies. It was an invasion of rebels, which this amendment, if I understand it aright, is intended to guard against and to prevent the recurrence of. On that occasion I am not aware, I do not remember that the State of Pennsylvania claimed the exclusive right of expelling the invaders, but on the contrary my recollection is that Pennsylvania called loudly for the assistance of her sister States to aid in the expulsion of these invaders—did not claim it as a State right to exclude them, did not think it was a violation of the sovereign rights of the State when the citizens of New York and New Jersey went to the field in Pennsylvania and expelled those invaders.

*Id.* at 2892. Cowan did not reply.

237. In support of his first proposed amendment, *supra* notes 65-70 and accompanying text, Bingham said that all citizens should have the privileges and immunities of citizens, and then asked, "Is it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?" *Id.* at 1090.

tion of the laws but not the right to own real estate has been in the Revised Statutes for more than one hundred years. Tracing the descent of the Civil Rights Act of 1866 into contemporary law reveals not one but two successor statutes: Revised Statutes Sections 1977 and 1978, codified as 42 U.S.C. §§ 1981 and 1982. The Civil Rights Act, as we know so well, prescribed equality among citizens with respect to a list of rights.<sup>238</sup>

The first of the two statutory descendants, R.S. § 1977, 42 U.S.C. § 1981, provides:

All *persons* within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by *white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (emphasis added)

The other, R.S. § 1978, 42 U.S.C. § 1982, says:

All *citizens of the United States* shall have the same right, in every State and Territory, as is enjoyed by *white citizens* thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. (emphasis added)

As far as the federal statutes are concerned, a state is free to forbid aliens, or indeed aliens of a particular race, from acquiring real property in the state.

This distinction, perhaps shocking to us, reflects the understanding that the acquisition of real property is a privilege of citizens not within the protection of the laws.<sup>239</sup> Section 1981, which protects all persons but does not equalize rights concerning property, began as a proposal by Senator William Stewart of Nevada in December 1869. It was designed to enforce the Equal Protection Clause for the benefit of alien immigrants, mainly Asians in California.<sup>240</sup> Like Section 1981, Stewart's draft applied to all persons but did not include

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238. Citizens were equal in the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and . . . [to] all laws and proceedings for the security of person and property," and were liable to "like punishment, pains, and penalties, and to none other." Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

239. The history of these statutes is set out lucidly in *Runyon v. McCrary*, 427 U.S. 160, 195-205 (1976) (White, J., dissenting). Although Justice White emphasized that § 1981 rests on the Equal Protection Clause, he did not mention the inference that § 1981 is narrower than the Civil Rights Act of 1866 because the Equal Protection Clause, which applies to everyone, is narrower than the Privileges or Immunities Clause, which applies only to citizens. Justice White's point was that § 1981 derives from the 14th Amendment, not the 13th Amendment.

240. CONG. GLOBE, 41st Cong., 2d Sess. 3 (1869) (resolution requesting Judiciary Committee to investigate whether legislation was needed to enforce treaty obligations and Equal Protection Clause); *id.* at 323 (S. 365 introduced); Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 564-68 (1984).

property rights. It eventually became Section 16 of the Voting Rights Act of 1870.<sup>241</sup> Section 18 of the Voting Rights Act readopted the Civil Rights Act of 1866, which protected only citizens but included property rights.<sup>242</sup> The revisers codified Section 16 and the twice-adopted 1866 Act by preparing two provisions: R.S. § 1977, which protects all persons with respect to the rights listed in Senator Stewart's section, and R.S. § 1978, which protects only citizens with respect to the property rights contained in the 1866 Act but not in Senator Stewart's list.

Stewart's decision to exclude property rights from his statute that would protect all persons was not an accident. When the Senate took up consideration of Stewart's bill, Kansas Republican Samuel Pomeroy initiated the following colloquy:

MR. POMEROY. I have not examined this bill, and I desire to ask the Senator from Nevada a question. I understand him to say that this bill gave the same civil rights to all persons in the United States which are enjoyed by citizens of the United States. Is that it?

MR. STEWART. No; it gives all the protection of the laws. If the Senator will examine this bill in connection with the original civil rights bill, he will see that it has no reference to inheriting or holding real estate.

MR. POMEROY. That is what I was coming to.

MR. STEWART. The civil rights bill had several other things applying to citizens of the United States. This simply extends to foreigners, not citizens, the protection of our laws where the States deny them the equal civil rights enumerated in the first section [of S. 365].

MR. POMEROY. They have the same civil rights in that regard. Does the property of a foreigner dying here descend under our laws? Most of the States appoint a public administrator who administers upon the estates of foreigners differently from what he does on the estates of citizens. Does this interfere with that?

MR. STEWART. I think not.

MR. POMEROY. Foreigners are not allowed to petition the Senate. If the bill passes, will the petitions of foreigners be received here?

MR. STEWART. . . . It has nothing to do with property or descent. We left that part of the law out; but it gives protection to life and

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241. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144.

242. *Id.* § 18.

property here. The civil rights bill, then, will give the courts jurisdiction to enforce.

MR. POMEROY. I am undoubtedly in favor of the object of the bill. I wanted to see how far the Senator was willing to go. So far as the bill goes I think it is right; I only question the propriety of not going further myself.<sup>243</sup>

Ever since 1870 the federal statutes have reflected Senator Stewart's understanding that citizens have rights that foreigners do not, but that all alike are entitled to the equal protection of the laws.<sup>244</sup>

The significance of this point cannot be overemphasized. If the Voting Rights Act of 1870 was a proper measure to enforce the Equal Protection Clause, then the clause prohibits discrimination on the basis of alienage with respect to the protection of the laws. If the protection of the laws includes the right to own real property, then the Equal Protection Clause would have extended this right to aliens, thereby overthrowing a well-established aspect of American law that the Republicans knew about and accepted. Section 16 of the 1870 Act, however, was drafted on the contrary premise, that the protection of the laws does not include ownership of real property.

It is tempting to respond that the Equal Protection Clause protects aliens from race discrimination but not from discrimination based on the fact that they are aliens. Senator Stewart's text, however, does not bear such a reading. The 1866 Act bans race discrimination by saying that all citizens shall have the same rights as white citizens. That means that a state cannot deny a citizen a listed right because that citizen is not white. Senator Stewart's provision says that all persons shall have the same rights as white citizens. Therefore a white

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243. CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870).

244. See Alfred Avins, *The Civil Rights Act of 1866, the Civil Rights Bill of 1966, and the Right to Buy Property*, 40 S. CAL. L. REV. 274, 304 (1967). Avins explained that Stewart's omission of the right to own real property

accords fully with the prevailing jurisprudence under article four, section two [the Comity Clause], that citizens had the right to own real property but aliens did not; while the omission of the right to own personal property is probably explained by the fact that it was not a matter of "protection of the laws," as then understood.

*Id.* (footnotes omitted). Avins understood that the Civil Rights Act rested in part on the Privileges or Immunities Clause, but may have thought that the Act was to that extent substantive. Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1, 6 n.21 (1968).

alien is entitled to the rights of a white citizen. That is simply a ban on alienage-based discrimination.<sup>245</sup>

In short, the federal antidiscrimination statutes as they emerged from Reconstruction reflect the understanding that the Equal Protection Clause does not prohibit discrimination with respect to all the rights listed in the Civil Rights Act of 1866. The text of the Fourteenth Amendment and historical usage of "protection of the laws" support this reading. If the Privileges or Immunities Clause is not an equality provision, then the drafters of Section 1 failed in their primary purpose.<sup>246</sup>

### B. *Protection*

At this point it may appear that the Fourteenth Amendment is like a rug with a bump in it. My attempt to resurrect the Privileges or Immunities Clause has displaced the confusion to the Equal Protection Clause, which no longer means what we thought it meant and now means who-knows-what. In the preceding section, I sought to cast doubt on the conventional understanding of the text of the Equal Protection Clause. In this section I will begin to reconstruct an interpretation of the clause based on the premise that the protection of the laws is a subset of government activities having to do with protecting people and their rights. This discussion sketches the core of the clause's meaning under that more limited interpretation.

The Equal Protection Clause's text suggests three conceptual issues: equality, denial, and the protection of the laws. I have already discussed the Reconstruction notion of equality, which is largely familiar from orthodox equal protection jurisprudence.<sup>247</sup> There is no reason to think that the concept of equality would be any different under the Equal Protection Clause, except that the states may make no distinction between citizens and aliens with respect to the protection of the laws.

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245. Confirmation of this point appears in § 17 of the 1870 Act, which provided criminal enforcement for § 16. Section 17, the descendent of which is 18 U.S.C. § 242, provided for the punishment of anyone who, under color of law, discriminated against any person with respect to any of the rights in § 16 "on account of such person being an alien, or by reason of his color or race." Act of May 31, 1870, ch. 114, § 17, 16 Stat. 144. Similarly, during debate on a naturalization bill, Republican Representative Aaron Sargent of California said that the Chinese "and any one else, no matter what his color, is entitled to the equal protection of our laws in life, liberty, and security," but not everyone should be made a citizen. CONG. GLOBE, 41st Cong., 2d Sess. 4275 (1870).

246. A conclusion along these lines is scarcely unique. See, e.g., MALTZ, *supra* note 20, at 97 ("In the 1860s, however, the different statuses [of citizens and aliens] were rather plainly viewed as implying a limitation on the rights guaranteed by the equal protection and due process clauses."). If it nevertheless seems odd, that may be because most of the leading academic literature on the Equal Protection Clause, including attempts to divine its original meaning, simply assumes that the clause requires equality in all state conduct without considering any other possibility. See, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

247. See *supra* notes 89-107 and accompanying text.

The only new question relating to equality is whether the clause is exclusively an equality requirement or whether it confers a substantive entitlement to the protection of the laws, with the proviso that protection must be equal. Although this is not easy, the best reading is that the clause requires only that whatever protection is given be given to everyone.<sup>248</sup> Classes modified by "equal" do not usually mark out a nonempty subset of the class. For example, if a school were required to give every student a hot lunch, it would have to give every student a lunch that was hot. But if it were required to give every student the same lunch, it probably could give them all nothing. The latter requirement may allow the students to be given something, but this is not the necessary result.

The idea of denial has an easily identifiable core: a purposeful decision by a state not to provide protection for a reason that violates the requirement of equality. The classic case occurs when the Ku Klux Klan lynches blacks and the government does nothing because government policy favors the Klan. If the clause governs the content of laws as well as their execution, then any law that unequally provides or withdraws protection also violates the clause. Difficult questions certainly would arise. For example, it might be hard to decide how deliberate a failure to protect must be in order to qualify as a denial.<sup>249</sup>

The concept of the protection of the laws presents two important questions. The first is whether protection refers only to the administration of the laws, or also to their content. Administration is plainly covered. If a state refuses to enforce its criminal battery laws when ex-slaves are attacked, it has violated the Equal Protection Clause. It is likely that the clause also governs the content of protective laws. The Civil Rights Act of 1866 gave blacks the full and equal benefit of all laws and proceedings for the security of person and property.<sup>250</sup> This is critical for equal protection, for one way of depriving someone of the benefit of a law would be to pass another law that took that benefit away. Thaddeus Stevens said that the amendment required that whatever law protected the white should protect the black equally, a point that goes to the substance of the laws.<sup>251</sup> Similarly, Bingham's initial draft was understood to affect the content of laws when it spoke of equal protection.<sup>252</sup>

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248. By contrast, tenBroek thought that the clause was not limited to equality because "the basic notion of this phrase is protection; equality is the condition." TENBROEK, *supra* note 49, at 222.

249. Some recent cases would make interesting material for an elaboration of this point. See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (Due Process Clause does not impose affirmative duties on states); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (criminal defendant's equal protection rights violated by overall pattern of state behavior only if "the decisionmakers in *his* case acted with discriminatory purpose").

250. Act of Apr. 9, 1866, ch. 31, §1, 14 Stat. 27.

251. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

252. Representative Hale thought so, and although Stevens argued that the proposal authorized Congress to equalize state protective laws but not to pass its own, he did not suggest that the equality requirement applied only to the execution and not the substance of the laws. *Id.* at 1063-66.



The second question is: what portion of a state's legal system makes up the protection of the laws?<sup>253</sup> More specifically, it is difficult to be sure whether those who spoke of the right of protection and the protection of the laws meant to refer solely to legal remedies, or also to some parts of the substantive law of rights. Remedial laws clearly are part of protection.<sup>254</sup> It is harder to say whether anything else is included. The best view may be that the rights to life and liberty—essentially, the right of personal security against violence—are in effect substantively protected, because they are so basic as to be inseparable from their protective shell: it is difficult to find the right to personal security anywhere in the law other than in remedial regimes such as assault and battery.<sup>255</sup> All those criminal law provisions of which a defendant might avail himself are thus within the protection of the laws because they secure natural liberty against the state. The protection of the laws with respect to property, however, probably includes only remedial laws, leaving the content of property rights outside the Equal Protection Clause.<sup>256</sup>

Substantive laws creating wholly positive or conventional rights—such as the right to vote, which does not exist in the state of nature—would not be protective. The clause would apply, however, to laws that *protect* conventional rights. For example, a state could not make it a crime to assault white voters without making it a crime to assault black voters, and it could not have a practice of prosecuting only assaults on white voters. This is a clear example

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253. We confront here the problem that the 14th Amendment puts into positive law certain concepts that had been used in political rhetoric but that had not been dealt with as legal doctrines. Thus, the many recorded discussions of equal protection and protection by government do not directly answer our questions. Largely for these reasons, Nelson generally rejects the notion that the 14th Amendment itself can be anything other than the starting point for the development of legal doctrines. NELSON, *supra* note †, at 6-9. This approach is not mine. I assume that the questions posed by legal texts have answers, though I am not so naive as to suggest that it is easy to find them.

254. Blackstone and Chief Justice Marshall, for example, said that protection consisted of the remedial part of the law. *Supra* notes 206-07 and accompanying text.

255. The right to liberty classically consisted of freedom from physical restraint: "This personal liberty consists in the power of loco-motion, of changing one's situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 BLACKSTONE, *supra* note 202, at \*130. Thus it too would be protected by laws against violence.

256. Bingham appears to have made this distinction between substance and protection with respect to property. When his proposal to give Congress power to require equal protection of life, liberty, and property was challenged on the grounds that it would establish national control over private law, specifically the law of property, he replied:

Although this word property has been in your bill of rights from the year 1789 until this hour, who ever heard it intimated that anybody could have property protected in any State until he owned or acquired property there according to its local law or according to the law of some other State which he may have carried thither? I undertake to say no one.

As to real estate, every one knows that its acquisition and transmission under every interpretation ever given to the word property, as used in the Constitution of the country, are dependent exclusively upon the local law of the States, save under a direct grant of the United States. But suppose any person has acquired property not contrary to the laws of the State, but in accordance with its laws, are they not to be equally protected in the enjoyment of it, or are they to be denied all protection?

CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866). Bingham erred in his dating of the Bill of Rights, assuming that he was referring to the Fifth Amendment.

of the difference between substance and protection, because under my reading neither the Equal Protection Clause nor the Privileges or Immunities Clause requires any state to allow anyone to vote.

The Equal Protection Clause thus, at the very least, forbids a state from deliberately refusing to enforce its protective laws for reasons that offend the rule of equality. It probably also imposes the equality requirement on the substance of a category of laws that was, in the nineteenth century, of fundamental importance. If the latter is true, then the Equal Protection Clause overlaps the Privileges or Immunities Clause to a significant extent. The overlap is not complete, however, because there is at least one legal right that is a privilege or immunity of citizens but is not within the protection of the laws: ownership of real property.<sup>257</sup> This exception may seem inconsequential, but the right to own real property, important even today, was truly fundamental in the agrarian Reconstruction era. Lyman Trumbull and his associates would have thought it a bitter joke had some Democrat suggested that freed slaves be given equality in all rights but that one.<sup>258</sup>

Moreover, the fact that we have complete confidence only with respect to the right to own property does not mean that there are not other rights that were not covered by the Equal Protection Clause. The Republicans distinguished between the full rights of citizens and the narrower rights of all persons, both in common usage and in Section 1 of the Fourteenth Amendment.<sup>259</sup> They thus highlighted an aspect of the concept of privileges and immunities that appears in the words themselves but that we rarely consider. Both "privileges" and "immunities" imply exclusivity, grants to some but, by definition, not all.<sup>260</sup> Thus, the contrast between the rights of citizens and less-favored aliens

257. See *id.* (aliens entitled to the protection of the laws but not to own real property).

258. Senator Henry Wilson of Massachusetts, arguing in favor of the Freedman's Bureau in an exchange with Senator Stewart of Nevada, made clear the importance of real property rights:

They have enacted a law in the state of Mississippi that will not allow the black man to lease lands or to buy lands outside of the cities . . . .

We must annul this; we must see to it that the man made free by the Constitution of the United States, sanctioned by the voice of the American people, is a freeman indeed; that he can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal . . . . I am sure the Senator from Nevada is in favor of that policy of emancipation that carries with it equality of civil rights and immunities, rather than that other policy that makes the enfranchised bondsman a serf or peon, the slave of society, its soulless laws and customs.

*Id.* at 111; see also 1865 Miss. Laws 82.

259. Nelson notes that there is an interpretation of the text that focuses on the distinction between the right of all persons to protection and the rights of citizens. "Under this interpretation, what ultimately became section one was designed to give constitutional stature to a basic distinction in mid-nineteenth-century American law between the rights of aliens and the rights of citizens." NELSON, *supra* note †, at 52.

260. A privilege is a "right, advantage, or immunity granted to or enjoyed by a person, or a body or class of persons, beyond the common advantages of others; an exemption in a particular case from certain burdens or liabilities." 12 OXFORD ENGLISH DICTIONARY 522 (2d ed. 1989). An immunity is an "[e]xemption from a service, obligation, or duty; freedom from liability to taxation, jurisdiction, etc.; privilege granted to an individual or a corporation conferring exemption from certain taxes, burdens, or duties." 7 OXFORD ENGLISH DICTIONARY 691 (2d ed. 1989).

is central to the concept of privileges and immunities. Justice Miller would have been justified in emphasizing the “privileges or immunities of *citizens* of the United States.”

The overlap between privileges and immunities and equal protection also goes a long way toward explaining remarks in the Reconstruction debates suggesting that the Equal Protection Clause constitutionalizes the Civil Rights Act of 1866. The most prominent of these is in Thaddeus Stevens’ speech introducing the amendment to the House.<sup>261</sup> Several things are noteworthy about Stevens’ explanation. First, he spoke about the second sentence of Section 1 as a unit and did not single out the Equal Protection Clause. Second, he included protection among the things that would be equal, which is hard to reconcile with the theory that equal protection underlies the whole list, but which does accord with the theory that protection is a subset of rights. Finally, all the examples Stevens gave fell within the overlap of privileges and immunities and protection.

#### V. APPLYING THE RECONSTRUCTED PRIVILEGES OR IMMUNITIES CLAUSE

Having suggested that the equality-based reading of the Privileges or Immunities Clause was available and advanced during Reconstruction, I begin this part by explaining why that reading, along with the more limited view of the Equal Protection Clause, is a more satisfying account of the text and history of Section 1. The rest of this part attempts to understand the scope of the Privileges or Immunities Clause. It focuses on the privileges and immunities of state citizenship, as the novelty of my interpretation lies in the suggestion that a ban on abridging them would forbid discrimination while retaining the states’ power over the content of their laws.

##### A. *The Better View*

The equal citizenship reading of the Privileges or Immunities Clause has several advantages over other readings that do not include an equality-based approach to state law rights. First, by providing a central role for the rights of state citizenship, it takes seriously the dual citizenship conferred by the first sentence of Section 1. The privileges or immunities of state citizenship are an

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261. Stevens, after a close paraphrase of the second sentence of § 1, explained that “these provisions” allow[] Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford “equal” protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same.

CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

embarrassment for a wholly substantive reading of the clause, which must either jettison them or imply that the Constitution dictates the content of state law in many particulars.<sup>262</sup>

Next, this approach reconciles the two constitutional provisions that speak of privileges and immunities of citizens. The rights of state citizenship protected by the Fourteenth Amendment are the very rights of state law referred to in the Comity Clause of Article IV.<sup>263</sup> More generally, this approach to the Fourteenth Amendment preserves the conceptual structure of privileges or immunities as a variable that is given its value by the content of the relevant law. In neither Article IV nor the Fourteenth Amendment does the concept have or need any independent content of its own. This last observation points up an additional attraction of the positive law understanding of privileges or immunities: it banishes most of the baffling uncertainty that has for so long surrounded those words for students of the Fourteenth Amendment. If the concept is indeed a variable that refers to the positive law, then the central task is distinguishing between those aspects of the positive law that constitute citizenship rights and those that do not. This task is not easy, but it is not as difficult as an inquiry into natural rights.

This Article has been guided by a question that arises out of historical context: Can the Privileges or Immunities Clause serve to read the Civil Rights Act of 1866 into the Constitution? My claim is that it can indeed do so, while simultaneously preserving the Civil Rights Act's fundamental character as a nonsubstantive ban on discrimination. As a textual matter, this interpretation brings together the Act, which refers only to citizens, and the provision of the Amendment that refers to citizens. The fact that most readings of Article IV identify privileges and immunities identical to the rights referred to in the Act also sits well with this approach.

An equality-based reading of the Privileges or Immunities Clause is not merely desirable but necessary if, as I claim, the Equal Protection Clause is properly understood as applying only to the protection of the laws, a body of rights narrower than the privileges and immunities of citizens and narrower than the Civil Rights Act of 1866. As explained above, that more limited reading, well known to students of the original understanding but contrary to the current orthodoxy, is textually attractive because it gives substance to the subject of the clause, the word "protection." This reading is historically well grounded in nineteenth-century ideas about the protective function of government, and

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262. For that reason, substantive readings paradoxically have to agree with Justice Miller's conclusion in the *Slaughter-House Cases* that the clause is limited to rights of distinctively national citizenship.

263. Because it adopts the approach to state citizenship rights that appears in the orthodox reading of the Comity Clause, my reading of the Privileges or Immunities Clause preserves a simple meaning for dual citizenship under the Constitution, a meaning consistent with ordinary notions of federalism: the rights of national citizenship are associated with the prohibitions imposed by the national constitution and the legislative competence of the national government, while the rights of state citizenship are associated with the state constitutions and the legislative competence of the state governments.

was in wide circulation during Reconstruction. Moreover, this reading accounts for the repeated Republican statements that Section 1 of the Fourteenth Amendment had nothing to do with voting, and was the explicit premise for an important piece of Republican civil rights legislation, the ancestor of 42 U.S.C. § 1981.

Finally, this reading of the Privileges or Immunities and Equal Protection Clauses gives a coherent account of the second sentence of Section 1. To see this, we need to consider an aspect of the Due Process Clause that has always been important but that is often glossed over because it is even more basic than what we normally call "procedural due process." The Due Process Clause provides that no State may "deprive any person of life, liberty, or property, without due process of law." It thus applies when the state acts against someone by taking away life, liberty, or property, and is usually understood to require that such unfavorable state actions occur only after the government has employed fair procedures.<sup>264</sup> But that is not all that the clause means. If, as seems likely, it derives from the "law of the land" provision of Magna Charta, the Due Process Clause also refers to the principle of legality itself: the requirement that the government act only pursuant to law—the "due process of law"—and not according to the whim of some official.<sup>265</sup>

It would make good sense for Section 1 to impose the principle of legality on the states. The main extralegal ground of government conduct in the white-dominated South of 1866 was race, followed by anti-Union sentiment. To require that official action against individuals be pursuant to law would eliminate such extraneous considerations. Moreover, the requirement of legality fits well with the principle of equality that underlies Section 1 because adverse government action based on the private feelings of officials is, by definition, partial and arbitrary. Finally, the procedural aspect of the Due Process Clause would ensure that Judge Lynch would no longer sit in the state courts.<sup>266</sup>

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264. See, e.g., *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856) (stating that Due Process Clause of Fifth Amendment requires that federal deprivations of life, liberty, or property be effected pursuant to procedures consistent with other provisions of the Constitution and with "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.").

265. The "law of the land" ("*per legem terrae*") provision of Magna Charta states: "No freeman shall be taken or imprisoned or disseised or outlawed or banished, or in any ways destroyed, nor will the king pass upon him, or commit him to prison, unless by the judgment of his peers, or the law of the land." COOLEY, *supra* note 139, at 351 n.1 (Cooley's translation). Its history is discussed in Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 95-100. If the due process requirement does not embody the "law of the land" rule, it probably embodies a similar but more limited usage of "due process" that refers only to the proper service of writs by the courts. *Id.* at 95-96. It is quite possible that by 1866 the phrase had taken on the "law of the land" meaning. Justice Swayne said in his *Slaughter-House* dissent that "[d]ue process of law" is the application of the law as it exists in the fair and regular course of administrative procedure." 83 U.S. (16 Wall.) 36, 127 (1873).

266. Abolitionists sometimes claimed that the Due Process Clause of the Fifth Amendment imposed on government an obligation to see that deprivation of life, liberty, or property was undertaken *only* by the government, and only as prescribed in law. This would make it into an equal protection provision. TENBROEK, *supra* note 49, at 119-22, 237-38. This approach to due process squeezes the two concepts of

The Due Process Clause prevents state activity that is, literally, lawless. Its complement is the Equal Protection Clause, which forbids the *denial* of protection and therefore prohibits inaction in the face of private lawlessness. Under these clauses combined, the state may move against an individual only pursuant to law, and may not sit on its hands while individuals threaten the rights of any person. Together, they impose regularity and hence equality on the administration of the laws. On this reading it is easy to see why these two clauses apply to all persons, not just to citizens. The principle of legality, and the protection of life, liberty, and property, are the basics of government. Citizens enjoy additional rights, but everyone is entitled to the minimum of due process and equal protection.

Section 1 of the Fourteenth Amendment thus mandates equal civil rights for citizens, the regular and impartial rule of law, and universal performance of the state's basic function. It is about equality through and through.

## B. *The Doctrine Reconstructed*

A doctrine of the reconstructed Privileges or Immunities Clause must have two components: a method of determining whether a law affects a privilege or immunity of citizens and a method of determining whether it violates the principle of equality by abridging a citizen's privileges or immunities. An abridgment must be contrasted with a change in the content of the law as it applies to all citizens. A doctrine of abridgment would deal with many of the problems that confront old-style substantive due process and new-style equal protection.

### 1. *Privileges or Immunities*

The Privileges or Immunities Clause forbids abridgment of the privileges or immunities of citizens, not of any other kind of rights. *Corfield* was about the distinction between privileges and immunities and other rights, like fishing in oyster beds. We should already have this doctrine because the Comity Clause has been in the Constitution from the beginning. There have been so few decisions under the clause, however, that the case law is sketchy at best.<sup>267</sup> Nevertheless, the Comity Clause suggests that we can approach the Fourteenth

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protection and legal regularity into a single clause. If we read the 14th Amendment in light of this history, it is natural to say that the protection requirement has been made explicit in the Equal Protection Clause and the procedural and rule of law aspects of § 1 are localized in the Due Process Clause.

267. See, e.g., *Toomer v. Witsell*, 334 U.S. 385 (1948). In recent times, the Court has not attempted to carry out the *Corfield* project of determining which categories of rights constitute privileges and immunities of citizens. Instead, it now interprets the clause in light of its presumed purpose of interstate harmony and asks whether some particular right is basic to the operation of the Union. See, e.g., *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978). As a result, the Court has developed an interpretation of the concept of privileges and immunities that is adapted to the Comity Clause but that is not useful for interpreting the same words in the 14th Amendment.

Amendment by asking whether a right is one as to which a state could discriminate against out-of-state Americans. As noted before, the core categories of the privileges and immunities of state citizenship are the private law and public protection rights covered by Section 1 of the Civil Rights Act of 1866.<sup>268</sup> Tax laws are also subject to the clause, because any feature that reduces a citizens' tax is an immunity.<sup>269</sup> Similarly, criminal liability and punishment must be equal because any legal rule that prevents conviction or reduces punishment is an immunity. Protections against government—constitutional rights as we use the term today—are immunities. As already noted, privileges or immunities as understood in 1866 probably did not include political rights. The most difficult question outside of the historical core involves government benefits.

Justice Washington's conclusion in *Corfield* was that fishing in a state's oyster bed is not a privilege or immunity of citizenship because it involves the division of the state's common property. This raises the question whether anything that we might now characterize as a government benefit can qualify as a privilege or immunity. The question is difficult, in part because public services are a more common and more important function of government now than when the Comity Clause or the Privileges or Immunities Clause was adopted. In light of that development, and of *Corfield*, it is tempting to say that government benefits are more like oyster beds than they are like the right to own property. This is unpersuasive, however, because there are many examples of government services known in the nineteenth century that very probably would have been classified as privileges or immunities of citizenship. Public roads, for instance, are an in-kind government benefit, and it is difficult to imagine that the Comity Clause permits a state to reserve them for its own citizens.<sup>270</sup>

While I cannot supply a full application of the concept of privileges and immunities of citizens to government benefits, one proposal seems promising. The rhetoric of privileges and immunities of citizens in the nineteenth century was heavily Lockean. It was based on the theory that individuals have natural

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268. See *supra* notes 117-21 and accompanying text. The classic privileges and immunities covered by the Civil Rights Act of 1866 are private capacity rights such as property and contract.

269. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230). Representative James Wilson, a Republican of Iowa and chairman of the House Judiciary Committee in the 39th Congress, explained the concept of an immunity when introducing the Civil Rights Bill, which at that point secured equal "civil rights and immunities":

What is an immunity? Simply "freedom or exemption from obligation;" an immunity is "a right of exemption only," as "an exemption from serving in an office, or performing duties which the law generally requires other citizens to perform." . . . A colored citizen shall not, because he is colored, be subjected to obligations, duties, pains, and penalties from which other citizens are exempted. Whatever exemptions there may be shall apply to all citizens alike . . . . One class shall not be required to support alone the burdens which should rest on all classes alike. This is the spirit and scope of the bill, and it goes not one step beyond.

CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).

270. Indeed, the protection of the laws—referred to in *Corfield* as "[p]rotection by the government," 6 F. Cas. at 551, and in the Civil Rights Act of 1866 as "benefit of all laws and proceedings for the security of person and property," Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27—is a government service.

rights that they bring into society, and that the purpose of government is to secure those rights by fixing them in definite law and protecting them with the coercive power of the state.<sup>271</sup> A favorite theme of Abolitionists and Republicans was that the individual, who had surrendered the natural right of self-protection by giving allegiance to the state, was entitled in return to be protected by the government.<sup>272</sup>

This way of thinking suggests a principle for deciding whether government benefits are privileges or immunities. When the government undertakes to provide something that individuals have a natural right to acquire, and either monopolizes its provision or forces citizens who obtain the benefit privately to pay for it a second time by taxing them for its public provision, then the benefit so provided is a privilege of citizens.<sup>273</sup> Protection of person and property, for example, is a privilege because the government, having monopolized the use of force, must give everyone protection to compensate for that which they are no longer permitted to provide themselves.

This means that most government benefits with which we are familiar will be privileges of citizenship because most of them are supported by general taxation.<sup>274</sup> Those that are financed largely or wholly by user fees may not

271. As Representative James Wilson put it during a debate on suffrage in the District of Columbia, with the institution of civil governments, "[w]hat were natural rights before, now become civil rights." CONG. GLOBE, 39th Cong., 1st Sess. 174 (1866); see also N.H. CONST. of 1784, pt. 1, art. V ("When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, without such an equivalent, the surrender is void.")

272. Representative Wilson said during the debate on the civil rights bill: "The highest obligation which the Government owes to the citizen in return for the allegiance exacted of him is to secure him in the protection of his rights." CONG. GLOBE, 39th Cong., 1st Sess. 1295 (1866). Representative Shellabarger similarly asked whether the national government could "prevent one race of free citizens from being by State laws deprived as a race of all the civil rights for the securing of which his Government was created, and which are the only considerations the Government renders to him for the Federal allegiance which he renders?" *Id.* at 1293.

273. I derive this idea from Judge Williams' suggested mode of adapting the Due Process Clauses to the modern activist state. Stephen Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3 (1983). Judge Williams suggests that government benefits qualify as property for purposes of the Due Process Clauses when the government, by financing the benefit through taxes, has forced the citizens to pay twice for the same good if they seek to obtain it privately. He also suggests that government licenses should be treated as property when the government has antecedently imposed the restriction on natural liberty consisting of the license requirement. The analysis is especially instructive because Judge Williams' approach, like that of most Republicans in 1866, is explicitly Lockean.

274. This approach resonates with Republican expressions of outrage against states that taxed both races for a service but then provided it only to whites or to blacks on less desirable terms. Debating the 14th Amendment, Senator Timothy Howe of Wisconsin cited the Florida school system as an example of unequal legislation. In Florida, both blacks and whites were taxed to support the white schools, but only blacks were taxed to support the black schools. CONG. GLOBE, 39th Cong., 1st Sess. 219 app. (1866). Republican Senator Oliver Morton of Indiana made this point in debating the bill that became the Civil Rights Act of 1875, which at that point mandated equal rights to common schools that were supported by taxpayers of both races:

[W]here schools are maintained and supported by money collected by taxation upon everybody, there is an equal right to participate in those schools . . . if there be a distinction, if the right to participate in these schools is to be governed by color or any other distinction, I say that is a fraud upon these who pay the taxes.

CONG. GLOBE, 42d Cong., 2d Sess. 3191 (1872). There is some play in the concept of general taxation. Some difficulties are built into the Constitution's terminology.



be. With this approach, however, the disposition of property that the state had not obtained from anyone, such as oyster beds, would not necessarily represent a privilege of citizens. But if the state used tax revenues to buy an oyster bed, it could not exclude citizens from fishing there on the basis of race, color, or previous condition of servitude.

## 2. *Abridgment and Equality*

### a. *Caste Legislation and Abridgment*

The Fourteenth Amendment's concept of abridgment depends on the distinction between laws that define rights and laws that determine who shall have them, such as a Black Code. A Black Code was an overlay on preexisting rights, based not on the normal considerations that determine the content of those rights, but based instead on an immutable, hereditary characteristic that had been integral to a vast system of exploitation in the South and a widespread pattern of disadvantage in the North. In order to understand how the Privileges or Immunities Clause might operate outside of its historical core, we must translate this central exemplar into a concept that can be applied to other situations.

The two central features of a Black Code—that it was an overlay on neutral laws and that it was based on race and color—generate the organizing principles of orthodox equal protection thinking. One approach views the Fourteenth Amendment as implicitly containing a series of absolute antidiscrimination rules like that in the Fifteenth Amendment. The task of interpretation is then to determine what the forbidden grounds of discrimination are. The other approach holds that equality is not concerned with grounds of classification but rather with reasons for employing those grounds. A law is then forbidden by the equality rule when it rests on a forbidden criterion, often referred to as *animus*.<sup>275</sup> The forbidden criterion is characterized as arbitrary or irrational, in contrast with the criteria that ordinarily underlie legislation.

In practice, the difference between the two approaches is that the animus-based theory permits the same basis of classification to be permissible under some circumstances and impermissible under others, depending on the purpose for which it was used. This means that the state sometimes may employ a normally forbidden basis of classification, even race. The focus on animus also means that certain characteristics of persons that are not normally thought of as marks of caste will nevertheless be forbidden when used for improper purposes. If individuals who drive foreign cars became the subject of widespread resentment, a law forbidding them from purchasing gasoline, that was

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275. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984). In Sunstein's terminology, a rule violates the equality requirement when it rests on a naked preference or a naked desire to harm.

motivated by a desire to retaliate against them, would be inconsistent with a ban on animus.

Does the Privileges or Immunities Clause ever permit distinctions based on race with respect to the rights of citizens? No. Does it recognize the existence of ad hoc castes, such as owners of foreign cars? Yes. The answers leave us with a confused concept. On the first issue, the best guidance to the Reconstruction notion of unequal legislation is offered by the civil rights statutes, which were the cutting edge of Republican antidiscrimination rules. Although their teaching is not entirely clear, I think these statutes indicate that discrimination with respect to race, color, or previous servitude is always unequal legislation.

This signal first appears in the Civil Rights Act of 1866, which states that all citizens shall have the same rights as white citizens. That is a ban on discrimination. It could be suggested that the Civil Rights Act permits a state to give nonwhites rights not enjoyed by whites because whites would then still have the rights of whites.<sup>276</sup> Although this is a plausible reading, its plausibility partly reflects our modern tendency to think in terms of the rights of potential plaintiffs in lawsuits, rather than in terms of abstract rules. If a nonwhite citizen has more rights than a white citizen, then the rule of the Civil Rights Act has been violated because all citizens do not have the same rights as white citizens.<sup>277</sup> The mature form of the Republican civil rights statute, the Civil Rights Act of 1875, was a simple prohibition on race discrimination with respect to public facilities.<sup>278</sup> If the 1875 Act is a model ban on unequal legislation, then the Fourteenth Amendment requires caste-blindness with respect to privileges or immunities of citizens.

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276. David Strauss made this point about the Civil Rights Act to me. Although it is true, it may reflect an accident of drafting. The Civil Rights Bill as originally introduced by Senator Trumbull did not use white citizens as a baseline; rather, its only reference to race, color, or previous condition of servitude banned all discrimination on those grounds thus prohibiting race discrimination against whites. *See* CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). Referring to that version of the legislation, Senator Trumbull explained that it was a bill "to secure equal rights to all citizens of the country, a bill that protects a white man just as much as a black man." *Id.* at 599. Also, the second Freedman's Bureau Act, which applied only in the rebel states, adopted a rule of nondiscrimination. It provided that a list of rights very similar to the one in the Civil Rights Act "shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery." Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176-77.

277. The teaching of the Civil Rights Act of 1866 on this subject is equivocal because § 2 of the Act, which provided criminal enforcement, penalized state actors who deprived inhabitants of rights protected under § 1, or who imposed greater punishments on an inhabitant than were prescribed for white persons. Act of Apr. 9, 1866, ch. 31, § 2, 14 Stat. 27. This suggests a focus on the rights of individuals, not the abstract rule of equality. On the other hand, the 1866 Act elsewhere spoke in terms of simple race-blindness. In § 4, it required the federal courts to appoint sufficient United States Commissioners to afford "reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery . . ." *Id.* ch. 31, § 4, 14 Stat. 28.

278. The 1875 Act provided that "all persons" were entitled to "full and equal enjoyment" of common carriers, inns, and places of public amusement, "subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Act of Mar. 1, 1875, ch. 114, § 1, 18 Stat. 336. The Act's jury selection provision similarly banned discrimination against anyone on the basis of race. *Id.* ch. 114, § 4, 18 Stat. 336-37.

Turning to the second question, the Reconstruction notion of abridgment probably also included what we might call *ad hoc* castes or castes-in-context—criteria that are not commonly employed but that nevertheless represent a division of the citizenry into classes for reasons unrelated to the content of fundamental rights. As an unrealistic example, imagine that a state placed limits on the contractual capacity of people whose names start with certain letters. That would abridge their right to contract because the alphabet has nothing to do with the law of contract. This aspect of the doctrine produces far harder cases than that of alphabet classification.

This result is not entirely satisfying because it leaves us with notions of equality and abridgment that seem somewhat cobbled together. That problem, however, is endemic to the concept of general equality, and it was that concept that the Republicans used. For this reason, I do not mean to suggest that my notion of unequal legislation solves the problems common to ordinary equal protection jurisprudence. Both understandings are rooted in the Reconstruction notion of generalized equality, and both share the difficulties of that frustrating way of thinking, which rests on an intuition that seems plausible until we begin to apply it in difficult cases.<sup>279</sup>

#### b. *Symmetrical Discrimination*

One of the most vexing questions during Reconstruction concerned race-conscious state laws that were nevertheless symmetrical and therefore arguably equal. Typical examples included antimiscegenation statutes, which prevented whites from marrying blacks just as they prevented blacks from marrying whites, and forced separation laws, which kept blacks from mingling with whites and vice versa. Such laws are equal in the sense that both races are subject to them.

Despite many Republicans' rebuttals to Democratic denunciations of interracial marriage, the Fourteenth Amendment forbids restrictions on privileges or immunities that take race into account. It is easiest to begin with the Civil Rights Act. Under a ban on interracial marriage, the rights of individuals of different races are not the same under all descriptions, because blacks can marry blacks and whites cannot, even though all are prevented from marrying members of the other race. But if the rights are different under any description, they are not the same. No rule that requires reference to a citizen's race in order to know that citizen's rights, therefore, will give citizens of all colors the same

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279. Peter Westen argues that the idea of equality has no independent content. He does not say that antidiscrimination rules are empty, but on the contrary suggests that equality sometimes functions simply as the label for an antidiscrimination rule. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 564-69 (1982) (discussing 14th Amendment as principle of racial nondiscrimination). As both my discussion here and the problems of standard equal protection analysis demonstrate, there is much to what Westen says.

rights. If marriage is a contract then the Civil Rights Act banned antimiscegenation laws.<sup>280</sup>

This question is easier under the Privileges or Immunities Clause than under the orthodox reading of the Equal Protection Clause. The latter's reference to equal protection makes possible the claim that the races are equal because the restrictions are symmetrical. The former clause, by contrast, forbids abridgments of privileges or immunities and hence focuses on restrictions on rights.<sup>281</sup> Under a symmetrical discrimination, people's rights are abridged because the right to marry or to contract is subject to a restriction based on a caste characteristic. A white person's right to marry a black person is abridged. The fact that a black person's right to marry a white is also abridged makes the statute more unconstitutional, not less so.

### c. *Beyond Race, Color, and Previous Condition of Servitude*

A difficult question for my theory, as well as ordinary equal protection analysis, is the existence of castes per se other than those based on race, color, and previous condition of servitude. Reconstruction saw some consideration, but no resolution, of the single most difficult of these questions—the caste status of sex. During the debate on Bingham's first proposed amendment, Representatives Hale and Stevens touched on sex discrimination but provided no illumination.<sup>282</sup> Justice Field in *Slaughter-House* thought that the Privileges or Immunities Clause permitted sex discrimination.<sup>283</sup> In *Bradwell v. Illinois*,<sup>284</sup> the case immediately following *Slaughter-House*, three of the *Slaugh-*

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280. Reverdy Johnson claimed that marriage was a contract and that the civil rights bill would forbid antimiscegenation laws. CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866). Senator Fessenden of Maine replied that there was no discrimination because a black man "has the same right to make a contract of marriage with a white woman as a white man has with a black woman." *Id.* Johnson rejoined that Fessenden's argument, the standard response, was beside the point. He gave as an example his own state's ban on interracial marriage, under which a black man could not marry a white woman but a white man could: "There is therefore in Maryland one law in relation to this question for the white man, and another law for the black man." *Id.* at 505-06. Johnson's argument was unanswerable, and no one really tried to answer it. On this issue, the Republicans either deceived themselves or decided that the only thing for it was a round untruth.

281. I realize that similar reasoning can be employed under the ordinary reading of the Equal Protection Clause. See *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. . . . Equal Protection of the laws is not achieved through indiscriminate imposition of inequalities."). Indeed, I think that such reasoning is correct, but that the conclusion follows more readily from the Privileges or Immunities Clause.

282. Hale argued that giving Congress power to mandate equality would be an enormous intrusion into areas normally reserved to the states. He gave as an example distinctions between the property rights of single and married women, and asked whether Congress could eliminate such distinctions. CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866). Stevens' response was a masterpiece of assertion masquerading as argument. He said that distinctions based on race were unequal but those between married women and "femmes sole" [sic] were not, but failed to explain why. *Id.* Hale pointed out that Stevens had suggested no way of telling permissible from forbidden bases of classification: "The line of distinction is, I take it, quite as broadly marked between negroes and white men as between married and unmarried women." *Id.*

283. 83 U.S. (16 Wall.) 36, 110 (1873).

284. 83 U.S. (16 Wall.) at 130.

*ter-House* dissenters explained that they would not hold that the Privileges or Immunities Clause forbade sex discrimination with respect to admission to the bar.<sup>285</sup>

On the other hand, counsel for Mrs. Bradwell was no less than Senator Matthew Carpenter, a leading member of both the Supreme Court's bar and the Republican Party. He argued that the Privileges or Immunities Clause forbade discrimination on the basis of sex just as it forbade discrimination based on race.<sup>286</sup> Carpenter's argument probably had merit, but this was a very hard question.

There is at least one characteristic other than race, color, or previous condition of servitude that does fit comfortably into both our own, and the Republicans', notion of caste—religion. Creed sometimes found its way onto lists of characteristics notwithstanding which all men were equal, and it had a long history as a basis for the creation of second-class citizenship.<sup>287</sup> The Constitution already contained the Religious Test Clause of Article VI, and religious freedom was a standard feature of the state bills of rights, some of which explicitly banned discrimination based on creed.<sup>288</sup>

Next, it is likely that political association, like religious belief, would constitute caste *per se*.<sup>289</sup> Specific examples in which we can have some confidence are loyalty to the Union and membership in the Republican Party. Politics is another ground of classification within the citizenry that has nothing to do with one's rights and is a common way of dividing people up for favor-

285. Justices Swayne and Field joined in the now-famous opinion in which Justice Bradley explained that the law of nature and nature's God destined women for domestic pursuits rather than the legal profession. *Id.* at 141-42 (Bradley, J., concurring). The Chief Justice dissented but wrote no opinion. *Id.* at 142.

286. *See id.* at 133-37 (argument of counsel).

287. For example, during the debate on the Civil Rights Act of 1875, Senator George Edmunds, a Republican from Vermont, characterized discrimination based on race, creed, and nationality as violations of an individual's right "to stand equal with his fellow-citizens." 3 CONG. REC. 1866 (1875); *see also* CONG. GLOBE, 42d Cong., 2d Sess. 25 app. (1872) (Sen. Thurman commenting on adherence to the 39 Articles as prerequisite for graduation from Oxford University).

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Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience . . .

N.H. CONST. of 1784, pt. 1, art. 5; *see also* N.J. CONST. of 1844, art. 1, § 4 ("[N]o person shall be denied the enjoyment of any civil right, merely on account of his religious principles.").

289. According to Cooley, the limitations on "unequal and partial legislation" built into his law-of-the-land or substantive due process doctrine implied that "a statute would not be constitutional which would proscribe a class or a party for opinion's sake." COOLEY, *supra* note 139, at 390 (footnote omitted).

able or unfavorable treatment.<sup>290</sup> In addition, political belief and action, like religion, already had substantial protection under American constitutions.<sup>291</sup>

The forbidden subjects thus include politics, religion, and possibly sex. This discussion of candidates for caste status has probably not advanced our understanding of that concept very much. These problems are the hard part of the Fourteenth Amendment and are not likely to go away.

### C. Applications

#### 1. Compulsory Segregation

The Supreme Court upheld a railroad car segregation law in *Plessy v. Ferguson*.<sup>292</sup> Although symmetrical, the law restricted the right to contract by forbidding a white citizen from buying a ticket on a car that carried blacks. It also limited the even more fundamental privilege of natural liberty because the black passenger was not allowed to walk into the white train car. The law should have been held invalid.<sup>293</sup> The same is true with respect to segregated public education. Schools financed by general taxation are very probably a

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290. For example, in 1860 the Maryland legislature passed a statute transferring responsibility for policing Baltimore from the municipal authorities to a newly created Board of Police. The Board was forbidden to employ any "Black Republican or endorser or approver of the *Helper Book*." 1860 Md. Laws ch. 7, § 6 (referring to Hinton Rowan Helper's inflammatory antislavery book, *IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT* (1857)). The Mayor and City Council of Baltimore objected to many aspects of the new legislation, including the disqualification. *Mayor & City Council v. State*, 15 Md. 376 (1860). The Supreme Court of Maryland admitted that the disqualification would be invalid "if we were to consider that class of persons as proscribed on account of their political or religious opinion." *Id.* at 468. The Court, however, held itself unable officially to tell what a Black Republican or Helperite was and refused to address the issue. *Id.*

291. *E.g.*, N.J. CONST. of 1844, art. I, § 18 (right to assemble, to consult for common good, to make views known to representatives, and to petition).

292. 163 U.S. 537 (1896).

293. I will have to disappoint the reader who expects me to criticize *Plessy* for having been decided under the wrong clause because despite its place in history as an equal protection case, *Plessy* was not decided under any particular words of the Constitution at all. It is, if anything, based on substantive due process. In response to a parade of horrors that included laws "requiring white men's houses to be painted white, and colored men's black," the Court explained: "The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class." *Id.* at 549-50. The sentence following Justice Harlan's famous color-blind epigraph puts the correct doctrine well: "In respect of civil rights, all citizens are equal before the law." *Id.* at 559. Justice Harlan also derided the majority's substantive due process argument: "But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable." *Id.* at 558.

privilege of citizens.<sup>294</sup> If so, to give individuals of different races different versions of the privilege would constitute an abridgment.<sup>295</sup>

## 2. Jury Selection

In *Strauder v. West Virginia*,<sup>296</sup> the Supreme Court held that a black defendant could not be convicted by a jury from which all blacks had been excluded.<sup>297</sup> Such a law would not abridge the privileges or immunities of the potential juror because jury service is a political and not a civil right. The Court, however, rested its decision on the rights of the defendant. Justice Strong argued that a criminal defendant received unequal protection when he faced a jury that had been selected from a pool containing no members of his race.<sup>298</sup> Although the issue is not easy, the result probably was right under both the Privileges or Immunities and Equal Protection Clauses, which overlap on this point. The difficult question is whether and when the race of the jury counts as part of the legal treatment afforded the defendant. I think that it did in *Strauder*. Certainly jury-composition rules can constitute immunities. Blacks could not be tried by juries deliberately drawn from conviction-prone groups.

## 3. Reverse Preferences

May the states undertake caste-conscious discrimination in favor of those who traditionally have been the victims of caste legislation?<sup>299</sup> Such preferential treatment is permissible where privileges and immunities are not involved. One of the most interesting questions on this point concerns public hiring and contracting. If we regard services provided by general taxation as privileges of

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294. See *supra* notes 270-74 and accompanying text. I agree with the argument given by Senator Frederick Sawyer, a Republican from South Carolina, during an 1871 debate over segregation in the District of Columbia schools. Although Sawyer was not addressing the 14th Amendment itself, his reasoning was based on its concepts:

These schools are maintained by the public funds, common, public funds—funds contributed by the entire community, funds raised by taxation, paid not by white men alone, but by men of all colors—and those funds should be administered impartially, giving to no class of men any privilege over any other class of men.

CONG. GLOBE, 41st Cong., 3d Sess. 1059 (1871).

295. I do not think that my theory of the 14th Amendment stands or falls with this question. Man is not the measure of all things, as Socrates replied to the Sophists, and neither is *Brown v. Board of Educ.*, 347 U.S. 483 (1954). An interpretation of the Constitution is not wrong because it would produce a different result in *Brown*.

296. 100 U.S. 303 (1880).

297. *Id.* at 305-12. The decision apparently rested on the Equal Protection Clause.

298. The Court said that the question presented was "whether by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impaneled without discrimination against his race or color, because of race or color." *Id.* at 305.

299. This discussion could be much more extensive. I am trying to work out the implications of my thesis rather than make a substantial contribution to the literature on these subjects. See, e.g., Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

citizens, we must then ask whether eligibility to be among those who provide the services also constitutes a privilege. Although answering this question is not easy, my thought is that the taxpayer's money purchases the service, not the opportunity for employment. Reverse discrimination with respect to actual privileges or immunities, however, is impermissible as a caste-based abridgment.

#### 4. *Facially Neutral Laws, Proxies, and Shams*

Not all the Black Codes were explicitly cast in terms of race.<sup>300</sup> If we make the extremely plausible assumption that their purpose was in fact to impose control on the freed slaves, these laws present the classic problem of shams. In this context, shams are laws that do not require that race be considered in their application, but are adopted as clever substitutes for facially discriminatory legislation. The simplest sham uses not the forbidden criterion of classification but some proxy. A standard illustration is the grandfather clause, used to evade the Fifteenth Amendment, under which an individual whose grandfather voted was excepted from a literacy requirement.<sup>301</sup> The literacy requirement would disenfranchise very many blacks and some whites, while the grandfather exception would rescue illiterate whites and virtually no such blacks.

Almost all constitutional prohibitions must confront the serious problems shams present. To take a notorious difficulty, antisham doctrines usually require an inquiry into collective legislative purpose, an enterprise that is extremely difficult at best.<sup>302</sup> It is worth noting, however, that a provision becomes more susceptible to shams as it becomes more rigidly formalistic, and that the Privileges or Immunities Clause is less formalistic than an explicit ban on discrimination like the Fifteenth Amendment.<sup>303</sup> For example, a sham based on a proxy that had no more to do with the subject matter than does race would violate the clause, not because of any doctrine of shams, but because it would constitute an abridgment on its own terms as a caste-in-context.

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300. See, e.g., 1866 Va. Acts 91-93 (vagrancy).

301. See, e.g., *Guinn v. United States*, 238 U.S. 347 (1915).

302. As the grandfather clause cases show, the attempt to eliminate shams can lead courts to derive a secondary rule concerning legislative purpose from a primary rule that may have been formulated solely in terms of the content of laws: the 15th Amendment says that the right to vote may not be abridged on the basis of race, and a grandfather clause law nowhere mentions race. As a reaction to the difficulties associated with intent tests, judicial attempts to deal with shams also tend to generate effects tests, in which a law is judged neither by its content nor by its purpose, but by the practical consequences it produces. A classic instance is the development of Establishment Clause doctrine in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and its progeny, such as *Wallace v. Jaffree*, 472 U.S. 38 (1985), and *Mueller v. Allen*, 463 U.S. 388 (1983).

303. Although I have given the grandfather clause as an example of a forbidden sham, Maltz maintains that the 15th Amendment was originally understood to be completely formalistic and hence readily evaded. MALTZ, *supra* note 20, at 155-56. It would be interesting to study the relation between the use of hypothetical examples involving racial shams and the decline of formalism in American legal thought.



### 5. *Incorporation of the Bill of Rights*

A full treatment of incorporation is beyond the scope of this Article because I will not be considering privileges and immunities of distinctively national citizenship in any detail. My discussion of this deep and important question will be limited to two observations.

The first is that the Privileges or Immunities Clause accomplishes something very much like incorporation as the Republicans would have understood it, no matter what we conclude about rights of national citizenship per se. The privileges and immunities of state citizenship include state constitutional protections, many of which are similar in subject matter to those contained in the first eight amendments to the federal Constitution. States may not, therefore, discriminate with respect to those rights. As things looked in 1866, this would go a long way toward actually applying the first eight amendments to the states. State and federal bills of rights overlapped substantially.<sup>304</sup> State laws suppressing the speech of blacks or unionists would constitute caste legislation or, if the state constitution remained facially intact, a denial of equal protection.<sup>305</sup>

This point does not answer all questions of incorporation. Suppose a state repealed its constitutional protection of religious freedom and passed a law forbidding all religious worship—would that abridge a privilege or immunity of distinctively national citizenship?<sup>306</sup> My second observation is that, assuming the correctness of *Barron v. Baltimore*,<sup>307</sup> the answer depends on a question of labels.<sup>308</sup> Constitutional prohibitions have labels that tell which level

304. See NELSON, *supra* note †, at 118. Nelson's account of incorporation is very similar to mine. *Id.* at 117-19.

305. This observation explains how an Abolitionist's outrage at the celebrated Hoar incident, and the claim that it violated the Comity Clause, would not necessarily imply a need for substantive federal protection of freedom of speech. In 1844, antislavery leader Samuel Hoar came from Massachusetts to South Carolina to protest the treatment of free blacks but was expelled by order of the South Carolina legislature. As Senator Sherman explained during the 39th Congress, the suppression of Hoar's speech violated the Comity Clause, which "gives to the citizen of Massachusetts, whatever may be his color, the right of a citizen of South Carolina, to come and go precisely like any other citizen." CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865). Sherman said that the problem was that Congress lacked the power to enforce the Comity Clause. *Id.*

306. This question has felled forests. See, e.g., *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting) (Privileges or Immunities Clause applies the first eight amendments to the states); Fairman, *supra* note 27, at 5 (Privileges or Immunities Clause does not apply the first eight amendments to the states); 2 CROSSKEY, *supra* note 25, at 1089-95 (does incorporate); RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989) (does not); CURTIS, *supra* note 26 (does).

307. 32 U.S. (7 Pet.) 243 (1833).

308. *Barron* held that the Fifth Amendment, like the rest of the first eight amendments, applies only to the national government. The counterargument is that Amendments II-VIII do not mention which government they apply to (except for the reference to courts of the United States in the Seventh Amendment), and thus might be perfectly general. On this point, no one has come up with a persuasive answer to John Marshall's argument in *Barron*. Marshall said that the Constitution tells us that restrictions apply to the states only if they say so. This is the plan of the original Constitution in Article I, §§ 9, 10. Section 9 speaks in general terms but applies only to the national government because § 10, which substantially overlaps with it, begins "No State shall." *Id.* at 248-49.

of government they operate against. The First Amendment by its terms applies to Congress, while the Contracts Clause by its terms applies to the states. If *Barron* is right, prohibitions that do not by their terms apply to the states have implicit labels like the one that is explicit in the First Amendment.

Incorporation under the Privileges or Immunities Clause turns on whether the definition of a right of distinctively national citizenship includes its label. If we read it with the label on, the First Amendment creates a right to be free from congressional abridgments of the freedom of speech. If we read without the label, the First Amendment protects the freedom of speech. If freedom of speech is, in and of itself, an immunity of national citizenship, then under the Fourteenth Amendment no state may abridge it.<sup>309</sup> When we take the label off the Sixth Amendment jury-trial right, or the Article III right to the writ of habeas corpus, we accomplish incorporation through the Privileges or Immunities Clause.

The no-labels approach rests on the argument that the Constitution, when we look at it with a hand over the Privileges or Immunities Clause, contains "inchoate" rights of national citizenship—privileges and immunities of United States citizens that are legally real but that the states might nevertheless abridge in the clause's absence. This position rejects Justice Field's claim in *Slaughter-House* that under the Supremacy Clause it is a tautology that no state may infringe the rights of national citizenship.<sup>310</sup>

#### D. *The Crescent City Company Reconsidered*

Sometimes the Supreme Court makes mistakes. By the Court's telling, the story of the Privileges or Immunities Clause is one of those tragedies where everyone dies in the last act. In *Slaughter-House*, Justice Miller's majority opinion held that the "privileges or immunities of citizens of the United States" did not include rights of state citizenship.<sup>311</sup> I have argued above that this is not the best reading of the text, but that on the contrary those privileges or immunities include rights of state positive law.

According to what is probably the standard reading of history, the dissenters in *Slaughter-House* disagreed with both Justice Miller's view and mine. The best known dissent is Justice Field's, whose opinion was joined by the entire minority.<sup>312</sup> The *Slaughter-House* dissenters are associated with the claim that the Privileges or Immunities Clause gives absolute protection to certain natural

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309. This is essentially Crosskey's argument. 2 CROSSKEY, *supra* note 25, at 1089-95. My understanding of this issue has profited enormously from conversations with Akhil Amar. His article on this subject, which adopts the no-labels approach, is by far the best argument in favor of incorporation under the Privileges or Immunities Clause. See Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

310. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96 (1873) (Field, J., dissenting).

311. *Id.* at 74 (emphasis supplied by the Court).

312. *Id.* at 83 (Field, J., dissenting).

rights that qualify as privileges or immunities of American citizens. Under a free government, privileges and immunities include the whole range of private capacities protected at common law, including the right to engage in any lawful calling, subject to such reasonable regulation as is necessary to secure the liberty of all. The calling of a butcher, subject to appropriate health and sanitation regulations, is wholly lawful. Therefore, when the Louisiana monopoly law prevented the plaintiffs from following their calling on their own premises it abridged one of their privileges or immunities.<sup>313</sup>

So far the standard reading. In fact, the dissents' discussions of the Privileges or Immunities Clause reflect the principle of equality perhaps even more than they reflect the concept of absolute rights. Justice Field first appealed to equality in his brief flirtation with the butchers' Thirteenth Amendment argument.<sup>314</sup> When he got to the serious business of the Fourteenth Amendment, Justice Field retained the equality theme. Discussing *Corfield*, he said that among the privileges and immunities of citizens "must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons."<sup>315</sup> He then said that what the Comity Clause

did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or different States. If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States.<sup>316</sup>

He was right.<sup>317</sup> Justice Bradley's dissent maintained that any American could

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313. *Id.* at 96-110. "All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness . . ." *Id.* at 101. We know this doctrine as economic substantive due process. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45 (1905). The stone that was rejected became the cornerstone for a while.

314. The nonmonopoly butchers maintained that the creation of castes among the citizens by the creation of a monopoly was an infringement of their freedom. Field quoted Senator Trumbull's argument that the 13th Amendment mandated equality among the citizens. 83 U.S. (16 Wall.) at 92 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866)).

315. *Id.* at 97.

316. *Id.* at 100-01.

317. Field was offended by monopolies because they were inconsistent with the principle of equality: This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition.

*Id.* at 109-10; *see also* Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785 (1982). Although Conant appears to equate the antimonopoly tradition with substantive rights, opposition to monopolies does not logically imply belief

go to any state and claim citizenship and "an equality of rights with every other citizen."<sup>318</sup>

Everyone knows that the rhetoric of the Reconstruction era mixed references to equality and to natural rights.<sup>319</sup> It is not, however, well known that the Privileges or Immunities Clause is hospitable to the principle of equality, nor that it was found to be so by the very Justices who made it famous as a possible vehicle for the constitutional protection of absolute natural rights. I will not speculate as to how this aspect of the *Slaughter-House* dissents has been lost to us.<sup>320</sup> It did not disappear altogether, though. While it is another commonplace that the doctrine of the *Slaughter-House* dissenters eventually triumphed, it is sometimes forgotten that the *entire* theory of the *Slaughter-House* dissenters reappeared: the classic doctrine of substantive due process had a strong element of equality.<sup>321</sup>

The only question left, then, is whether the dissenters were right about the application of equality notions to the facts of *Slaughter-House*. I think they were. The plaintiffs in *Slaughter-House* argued that the monopoly was unequal legislation and Justice Field agreed. They were right that being a butcher is a privilege of state citizenship. Pursuing an ordinary calling is a civil right, and the monopoly limited natural liberty. On the other hand, not being a member of the Crescent City Live-stock Landing and Slaughter-House Company is not a mark of caste per se. The more difficult question is whether it was an ad hoc caste on the facts of the case. That depends largely on whether we credit the argument that a monopoly furthered the interests of all butchers and hence was related to the subject of slaughtering, or whether we attribute the monopoly to simple venality.

Constitutional equality provisions are not always easy to apply. *Slaughter-House* would be a difficult case today, except that the hard questions would be hidden by the assumption, built into "rational basis scrutiny," that the states generally do not act for forbidden purposes. If, as seems likely, the recipients of the monopoly were chosen for no reason other than their favor with the

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in absolute rights because monopolies are defined by their unequal nature.

318. 83 U.S. (16 Wall.) at 113.

319. See, e.g., NELSON, *supra* note †, at 64-90.

320. The tale was saved and not lost by David Currie. See CURRIE, *supra* note †, at 342-51.

321. For example, in striking down a state ban on yellow-dog contracts, Justice Pitney explained that the 14th Amendment limits the states to pursuing the "general welfare," which does not include simply "leveling inequalities of fortune" by improving the position of some at the expense of others. *Coppage v. Kansas*, 236 U.S. 1, 18 (1915). To Justice Pitney, redistributive legislation was partial and arbitrary because transfers from one private person to another served only private interests. This is confirmed by the old doctrine's "public purpose" requirement with respect to takings and the regulation of property. See, e.g., *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896). This principle, not the notion that the 14th Amendment incorporates the Takings Clause, is the original ground of the Supreme Court's conclusion that the states may take private property for public use only if they provide just compensation. *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 236 (1896) (prohibition on pure transfers between private persons implies prohibition on transfers to the state without compensation). See generally COOLEY, *supra* note 139, at 389-97 (discussion of "Unequal and Partial Legislation").

legislature, then the Louisiana law did not represent a neutral change in the rights of its citizens.<sup>322</sup> *Slaughter-House* was probably wrong.

### E. *Paramount National Citizenship and Federalism*

The equality-based reading of the Privileges or Immunities Clause is not the only nonstandard account of the Fourteenth Amendment. My account emphasizes that many Republicans believed the Privileges or Immunities Clause forbade discrimination with respect to rights conferred upon citizens by state law. The power to enforce such a rule, however, does not give Congress authority over the substance of ordinary private law, such as the power to regulate common carriers within the states. There is, however, a related but fundamentally different theory of the Fourteenth Amendment, according to which Congress has precisely that power.

It was sometimes said during Reconstruction that the Fourteenth Amendment made national citizenship paramount, whereas before the Amendment's adoption it had been subordinate to state citizenship.<sup>323</sup> On this view, citizenship brings with it the privileges and immunities of citizens, whatever they may be. It was also said that the Fourteenth Amendment gave the national government the task of protecting the rights of its citizens.<sup>324</sup> The rights of citizens range from contractual capacity to frequenting places of public amusement. If paramount national citizenship meant that all citizens' rights were now under congressional control, then Congress could create a right of access to common carriers just as a state could.

Let there be no mistake about it—this theory of paramount national citizenship would abolish the doctrine of enumerated powers and with it American federalism.<sup>325</sup> The congressional authority it sanctions is not limited to ensur-

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322. Justice Miller denied this in *Slaughter-House*, arguing that the monopoly was wholesome and not invidious, even though his approach to the Privileges or Immunities Clause did not require that he address this issue. 83 U.S. (16 Wall.) at 60-66.

323. The language of paramount national citizenship was utilized in one of the early circuit court cases under the Voting Rights Act of 1870, where the court said that under the 14th Amendment "[c]itizenship in the United States is defined; it is made independent of citizenship in a state, and citizenship in a state is a result of citizenship in the United States." *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282). The facts of *Hall* suggest that Judge Woods, writing for the court, took an expansive view of Congress' power under § 5, because the case was a prosecution against private persons. See also Howard J. Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment: II Systemization 1835-1837*, 1950 Wis. L. REV. 610, 659 (concept of paramount national citizenship originates with Abolitionists in 1830's).

324. Senator Howe suggested this when he said that the 14th Amendment to some extent transferred control of citizens to the national government. 2 CONG. REC. 4147 (1874). Carpenter said much the same thing in an exchange with Senator Trumbull during the Ku Klux Act debate. According to Carpenter, the 14th Amendment effected a "tremendous" revolution in our system of government because "[i]t gives Congress affirmative power to protect the rights of the citizen, whereas before no such right was given to save the citizen from the violation of any of his rights by State Legislatures, and the only remedy was a judicial one when the case arose." CONG. GLOBE, 42nd Cong., 1st Sess. 577 (1871).

325. This interpretation is urged by Robert Kaczorowski, who says that the Republicans acted on the theory that the 13th and 14th Amendments eliminated the limitations on Congress' powers. "The scope of

ing equality, although it can certainly be used to do that. It goes far beyond anything granted elsewhere in the Constitution, at least as the Constitution was understood in the nineteenth century. If Congress could protect the rights of citizens in this sense, there would be neither need nor role for the states.<sup>326</sup>

In rejecting this interpretation, I do not mean to say that the Fourteenth Amendment does not contain a doctrine of paramount national citizenship. The interpretation of the Privileges or Immunities Clause I present is such a doctrine. According to my account, it is vital to distinguish between ensuring the possession of rights and having power to define them. If I am correct, the Fourteenth Amendment decrees who shall have the rights of state citizenship and thereby mandates an equality of rights. That was serious business in 1866, for it took from the states the power to classify their citizens. It did not, however, take from them the power to determine the substance of the equal rights of all.

The Fourteenth Amendment, as I understand it, also significantly expands the power of Congress to ensure citizens of their rights by passing laws such as the Civil Rights Act of 1866. That too was serious business but still stops short of a congressional power to define all the rights of citizens. On the contrary, Congress' ability to grant or define rights continues to be limited to its enumerated powers. National citizenship thus becomes paramount because it is granted by the national Constitution and brings with it the full rights of state citizenship. Congress becomes the final guardian of the citizens' right to possess their privileges and immunities but retains only limited authority to define these rights. This distinction between the possession and the content of rights secures equal citizenship while preserving enumerated national powers and thus American federalism.<sup>327</sup>

To choose between these two views, we must begin with the observation that the text of the Privileges or Immunities Clause is not hospitable to a

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this authority was potentially destructive of American federalism. If Congress chose, it could legislate criminal and civil codes that displaced those of the states." ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 3 (1985).

326. Contrary to Kaczorowski, I do not think this most expansive interpretation actually had many adherents. Rather, although expansive language was sometimes used, the specific problems being addressed involved race discrimination. The most difficult questions on this topic concerned private violence against blacks and supporters of the Union, and it was in this context that Judge Woods wrote his opinion in *United States v. Hall*, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282). One of the leading theorists of paramount national citizenship evidently drew back from suggesting total congressional authority over citizens' rights: "The Constitution had been re-amended in 1866. It had been re-amended, among other reasons, to assure national powers over persons and property in the States in so far as necessary to reach and prevent race discrimination." Howard J. Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 37 (1954).

327. Although I cite Howe and Carpenter as Republicans who referred to national protection of citizens' rights, I do not think they regarded the 14th Amendment as a grant of general legislative power to Congress. When debating Senator Trumbull, Carpenter showed that he was thinking about equality: "Now the question is upon [the 14th] amendment of the Constitution. Are not the privileges and immunities of every citizen of the United States put on a par in every State of the Union?" CONG. GLOBE, 42nd Cong., 1st Sess. 576 (1871).

general congressional power over citizens' rights.<sup>328</sup> The obstacle to reading the clause to confer general federal legislative power is that the clause is a rule for the states. Congress can require state compliance under Section 5, but its power is defined by the primary rule to which it attaches.

To illustrate this point, consider whether Congress could pass a uniform national property law pursuant to the Privileges or Immunities Clause and Section 5. Assume there are no state laws that abridge the privileges or immunities of citizens.<sup>329</sup> Rather, Congress has simply decided to take its power over the rights of citizens as seriously as it takes its commerce power and to legislate as it deems expedient. Assume that Congress' property law recognizes tenancy by the entireties, a privilege that is not within the natural right to property.

Congress' tenancy provision does not require that the states comply with the mandate of the Privileges or Immunities Clause because that mandate does not include tenancy by the entireties.<sup>330</sup> The only sense in which the law enforces Section 1 is that it makes it legally impossible for a state's property law to violate the Constitution by rendering the state's law inoperative. In fact, any congressional preemption of substantive state law would perform this function. By this way of thinking, Congress could keep the states from violating Section 1 by abolishing them. This is what happens when we try to avoid the clause's character as a rule for the states.

The Privileges or Immunities Clause, read with Section 5, does not say that Congress has substantive authority over the rights of citizens. In order to avoid this textual difficulty, the argument for broad congressional power is often

328. Kaczorowski suggests that his claims concerning plenary federal power may derive from provisions of the 14th Amendment other than the Privileges or Immunities Clause. Kaczorowski, *supra* note 33, at 915. Although I am primarily concerned with only one provision, I think my argument also applies to the Due Process and Equal Protection Clauses, because they too are prohibitions on the states. I am also skeptical of the claim that the first sentence, by imposing a rule concerning the preexisting category of national citizenship, repealed Article I, § 8 and the 10th Amendment.

329. This stipulation is important. The debates on the Ku Klux Act and the Civil Rights Act of 1875 focused on the question whether Congress could *ever* act directly on private persons. It is entirely possible to say that such direct legislation is sometimes authorized while denying that Congress can simply replace the states. Then-Representative Garfield, during the Ku Klux Act debate, said that Congress could provide direct protection against private outrages when, but only when, the states had failed to do so. He explained that the problem of the Klan arose because

by a systematic maladministration of [the laws], or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the last clause of the first section empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection.

CONG. GLOBE, 42nd Cong., 1st Sess. 153 app. (1871); *see also* Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1359 (1964) (setting out moderate Republican theory of congressional power where states have defaulted). Jacobus tenBroek too seems to have adopted Garfield's view or something like it. *See* TENBROEK, *supra* note 49, at 202-03, 220-23.

330. That is true even if the privileges or immunities of citizens include substantive natural rights. Nor, by hypothesis, is any part of the property law designed to alleviate some other substantive violation of § 1. It is an interesting question whether Congress' enforcement powers authorize deliberately overbroad measures to prevent violations of the primary rules. *See Oregon v. Mitchell*, 400 U.S. 112 (1970) (nationwide ban on literacy tests sustained even in states that never used literacy tests for unconstitutional purposes).

rested on the drafting history.<sup>331</sup> The second sentence of Section 1 derives from Bingham's earlier February proposal.<sup>332</sup> The earlier proposal would have empowered Congress to secure privileges and immunities as well as equal protection in life, liberty, and property, although it is doubtful whether it actually would have given Congress power to enact uniform federal civil and criminal codes. The argument that the Fourteenth Amendment grants Congress plenary power over civil rights rests on two claims about the drafting process: first, that Bingham's earlier draft would have given Congress such authority, and second, that nothing important changed when the February proposal was rewritten to become Sections 1 and 5 as we have them today.

This claim is not persuasive. First, Representative Hale, the principal Republican opponent of Bingham's proposed amendment, was afraid that it would grant Congress general power to protect life, liberty, and property.<sup>333</sup> But neither Thaddeus Stevens nor John Bingham said that he wanted to do so. Rather, both said that the second clause was limited to equality, and neither asserted that the first clause went farther.<sup>334</sup>

Moreover, Representative Hotchkiss advanced the same objection as Representative Hale and Senator Stewart. He understood that the purpose of Bingham's amendment was to end discrimination among citizens.<sup>335</sup> Hotchkiss was in favor of that, but he thought the proposal by its terms would

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331. See, e.g., Kaczorowski, *supra* note 33, at 913-17.

332. See CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

333. Nine years later, toward the end of the debate on the 1875 Act, Hale asserted that the 14th Amendment as it finally emerged did the thing to which he had objected: it "*did* change the constitutional powers of legislation of Congress . . . and introduced a range of legislation by Congress utterly lacking in the old Constitution." 3 CONG. REC. 979 (1875). He never said, however, exactly what new power the amendment conferred on Congress, and the context suggests that he thought the new power principally concerned direct national action where the states had violated § 1. Hale said that § 5 empowered Congress "in the first instance to remedy the great evil against which the amendment proposes to guard." *Id.* at 980. That evil was probably race discrimination, including racially motivated inaction in the face of private violence. No one would deny Hale's point that the 14th Amendment significantly changed federal-state relations, but he never suggested that it went beyond equality all the way to giving Congress power to supplant the states with its own code.

334. In the other chamber, Senator Stewart explained that he opposed Bingham's draft because it would obviate not only the need for the Civil Rights Bill or any more constitutional amendments, but also "the necessity of any more State Legislatures or conventions." CONG. GLOBE, 39th Cong. 1st Sess. 1082 (1866). Stewart said that Bingham's amendment would "work an entire change in our form of government." *Id.* Referring to the equal protection provision, he said:

The only way this could be accomplished, would be for Congress to legislate fully upon all subjects affecting life, liberty, and property, and in this way secure uniformity and equal protection to all persons in the several States. When this was done, there would not be much left for the State Legislatures, for I apprehend that the great body of the laws of the several States as in fact of any government relates to the protection of life, liberty, and property. Undoubtedly this had reference to some other subject. It undoubtedly had reference to protecting the negro or something of that kind . . . I think the committee had in view one object, but by their amendment would accomplish another.

*Id.*

335. *Id.* at 1095.



authorize Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property. I am unwilling that Congress shall have any such power. Congress already has the power to establish a uniform rule of naturalization and uniform laws upon the subject of bankruptcy. That is as far as I am willing that Congress shall go.<sup>336</sup>

Hotchkiss wanted to preserve enumerated powers while also protecting equality. Bingham did not indicate disagreement.<sup>337</sup> In the light of Hotchkiss' explicit repudiation of any intent to grant Congress substantive power, Bingham's response demonstrates either that he envisioned no such power or that he was deliberately holding out on the House.

I leave it to those more knowledgeable than I to address the broader historical question as to whether anyone in 1866 wanted to give the national government general legislative power. My point is that the text of the Privileges or Immunities Clause does not give Congress plenary power to define the rights of citizens and thereby legislate on virtually every subject, and that the drafting history indicates that this was quite deliberate. Rather, the clause makes national citizenship paramount as Hotchkiss wanted, by providing "that no State shall discriminate against any class of its citizens."<sup>338</sup>

## VI. CONCLUSION

According to John Hart Ely, "the slightest attention to language will indicate that it is the Equal Protection Clause that follows the command of equality strategy, while the Privileges or Immunities Clause proceeds by purporting to extend to everyone a set of entitlements."<sup>339</sup> Ely is precisely correct. That is what we will think if we pay the slightest attention to language. The consequences of slight attention are manifest in our non-jurisprudence of the clause. If we are convinced that the great riddle is the concept of privileges and immunities of United States citizens we are led in either of two directions. One of them, taken in *Slaughter-House*, makes the provision trivial. The other, pursued in the various substantive theories of the clause, supposes that the vitally important Fourteenth Amendment employs a concept that is not just vague at the edges, but that has no discernible core of meaning.

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336. *Id.*

337. In reply to Hotchkiss, Bingham said that the amendment

is not to transfer the laws of one State to another State at all. It is to secure to the citizen of each State all the privileges and immunities of citizens of the United States in the several States. If the State laws do not interfere, those immunities follow under the Constitution.

*Id.* at 1095. That response is no endorsement of plenary federal authority to protect the life, liberty, and property of all persons. The statement that citizens' rights follow under the Constitution if the states do not interfere seems to mean once again that Congress will need to use its new enforcement power only if the states violate the Constitution.

338. *Id.*

339. ELY, *supra* note 7, at 24.

If we pay more attention to language, we realize that it is possible for a state to abridge a state law right and conclude that the clause secures equality with respect to such rights. If we pay enough attention to the Equal Protection Clause to get beyond the word equal, we discover that protection is narrower than privileges and immunities. We then can conclude that the Privileges or Immunities Clause does the main work of Section 1 by constitutionalizing the Civil Rights Act of 1866.

My final suggestion is that we have gotten things backwards. Because it seems to be either tautological or incomprehensible, the Privileges or Immunities Clause is often taken as an instance of the principle, enunciated by the late Arthur Leff, that it is easy to say nothing with words.<sup>340</sup> On the contrary, the words do say something. Indeed, they say exactly what their historical context would lead us to expect them to mean.

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340. See Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 559 (1967).